No. 16-1023

Title:	North Carolina, et al., Appellants v. Sandra Little Covington, et al.
Docketed:	February 23, 2017
Linked with 16A646	
Lower Ct:	United States District Court for the Middle District of North Carolina
Case Nos.:	(1:15-cv-399)
Decision Date:	November 29, 2016

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 30 2016	Application (16A646) for a stay of remedial order pending resolution of direct appeal in this Court, submitted to The Chief Justice.
Jan 3 2017	Response Requested due no later than noon on January 9, 2017
Jan 9 2017	Response to application from respondent Sandra Little Covington, et al. filed.
Jan 10 2017	Reply of applicant North Carolina, et al., Appellants filed.
Jan 10 2017	Application (16A646) referred to the Court.
Jan 10 2017	Application (16A646) granted by the Court. The application for stay of the order of the United States District Court for the Middle District of North Carolina, case No. 1:15-CV-399, entered on November 29, 2016, presented to The Chief Justice and by him referred to the Court is granted, pending the timely filing of a statement as to jurisdiction. Should such statement be timely filed, this order shall remain in effect pending this Court's action on the appeal. If the judgment should be affirmed, or the appeal dismissed, this stay shall expire automatically. In the event jurisdiction is noted or postponed, this order will remain in effect pending the sending down of the judgment of this Court.
Feb 21 2017	Statement as to jurisdiction filed. (Response due March 27, 2017)
Feb 28 2017	Motion to affirm filed by appellees Sandra Little Covington, et al.
Mar 14 2017	Opposition to motion to affirm of appellants North Carolina, et al., Appellants filed.
Mar 15 2017	DISTRIBUTED for Conference of March 31, 2017.
May 22 2017	DISTRIBUTED for Conference of May 25, 2017.
May 24 2017	Supplemental brief of appellants North Carolina, et al., Appellants filed. VIDED. (Distributed)
May 30 2017	DISTRIBUTED for Conference of June 1, 2017.
May 31 2017	Response to supplemental brief from appellees Sandra Little Covington, et al. filed. VIDED. (Distributed)
Jun 5 2017	The judgment is VACATED, and the case is REMANDED. Opinion per curiam. (Detached Opinion)
Jun 6 2017	Application (16A1203) for issuance of the judgment forthwith, submitted to The Chief Justice.

Jun 7 2017	Response to application (16A1203) requested by The Chief Justice, due Tuesday, June 13, 2017, by 3 p.m. ET.
Jun 13 2017	Response to application from Philip E. Berger, et al. filed.
Jun 13 2017	Response to application from North Carolina, et al. filed.
Jun 14 2017	Reply of Sandra Little Covington, et al. filed.
Jun 15 2017	Application (16A1203) referred to the Court.
Jun 15 2017	Application (16A1203) denied by the Court.
Jun 30 2017	JUDGMENT ISSUED.

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RECORD AND BRIEF

16-1023

No. ___

FILED
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In the

Supreme Court of the United States

STATE OF NORTH CAROLINA, ET AL.,
Appellants,

v.

SANDRA LITTLE COVINGTON, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

A three-judge district court declared that North Carolina's state legislative districts were the product of unconstitutional racial gerrymandering. The court allowed the 2016 election to go forward as planned, but it ordered the State to draw new districts for the 2018 election. But after the 2016 election results were in—and after the State already had filed its notice of appeal and jurisdictional statement in this Court—the district court decided to expand the scope of relief it had previously ordered by partially invalidating the results of the 2016 election and ordering off-year special elections in substantial parts of the State. This extraordinary remedy effectively halved the constitutionally specified terms of Representatives and Senators in much of the State. The district court did not identify anything exceptional about this case that would warrant this extraordinary remedy. This Court granted a stay of the special-election order, pending the filing and disposition of this jurisdictional statement.

The questions presented are:

1. Did the district court have jurisdiction to expand upon its previously ordered remedy after the State filed its notice of appeal?

2. Did the district court exceed the bounds of its equitable discretion by partially invalidating election results, abrogating several provisions of the state constitution, and ordering a special election—all without any discussion of the competing equities?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

James Edward Alston; Marshall Ansin; Valencia Applewhite; Marvin Cornelous Arrington; Susan Sandler Campbell; Sandra Little Covington; Mark R. Englander; Viola Ryals Figueroa; Jamal Trevon Fox; Dedreana Irene Freeman; Claude Dorsey Harris, III; Channelle Darlene James; Crystal Graham Johnson; Catherine Wilson Kimel; Herman Benthle Lewis, Jr.; David Lee Mann; Cynthia C. Martin; Vanessa Vivian Martin; Marcus Walter Mayo; Latanta Denishia McCrimmon; Catherine Orel Medlock-Walton; Antoinette Dennis Mingo; Rosa H. Mustafa; Bryan Olshan Perlmutter; Julian Charles Pridgen, Sr.; Milo Pyne; Juanita Rogers; Ruth E. Sloane; Mary Evelyn Thomas; Gregory Keith Tucker; John Raymond Verdejo

Defendants:

The State of North Carolina; North Carolina State Board of Elections; Rhonda K. Amoroso, in her official capacity; Philip E. Berger, in his official capacity; Paul J. Foley, in his official capacity; Joshua B. Howard, in his official capacity; Maja Kricker, in her official capacity; David R. Lewis, in his official capacity; Joshua D. Malcolm, in his official capacity; Timothy K. Moore, in his official capacity; Robert A. Rucho, in his official capacity

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INTRODUCTION

A few months before the November 2016 election, a three-judge district court invalidated North Carolina's state legislative districting plan, ruling that the legislature's good-faith effort to navigate the narrow channel between the competing demands of the Equal Protection Clause and the Voting Rights Act ("VRA") was unsuccessful. The district court allowed the 2016 election to take place as scheduled and ordered the legislature to enact a new districting plan before the next election. The State timely filed a notice of appeal from that order and then filed a jurisdictional statement in this Court, which remains pending.

The 2016 election proceeded as scheduled, with millions of North Carolina voters casting ballots for the state legislators who would represent them for two-year terms in accordance with the North Carolina Constitution. After the results were in, however, the district court decided to expand upon the remedy it had previously ordered. Without explaining how it could exercise jurisdiction over a case that was already on appeal to this Court, and without explaining the inadequacy of the remedy it previously ordered (a remedy that has sufficed in every case in which this Court has found a *Shaw* violation), the district court declared that most of the newly elected legislators would serve only one-year terms, and it ordered the State to hold off-cycle special primary and general elections in 2017. In doing so, the district court expressly abrogated multiple provisions of the North Carolina Constitution, including the requirement that

senators and representatives serve two-year terms, N.C. Const. art. II, §8, and the requirement that any candidate reside in the district in which she is running for at least one year preceding the election, *id.* art. II, §§6, 7.

This Court already has issued an emergency stay halting the district court's extraordinary remedial order. *See* Order, *North Carolina v. Covington*, No. 16A646 (Jan. 10, 2017). The Court should now note probable jurisdiction and vacate that order, which was issued with neither jurisdiction nor justification. The district court lacked jurisdiction because the State's notice of appeal divested the court of the power to expand upon its previously ordered remedy. And the district court lacked justification because this simply is not the rare and extraordinary case that might justify the federalism-obliterating remedy of invalidating election results and ordering off-year special elections throughout the State. Absolutely nothing about this case warrants departing from the standard remedy for a *Shaw* violation—*i.e.*, requiring a new districting plan for the next regularly scheduled election. In fact, multiple factors make the extraordinary remedy of a special election particularly inappropriate here, including the pendency of related cases before this Court, the tenuousness of the finding of a violation (as evidenced by a state court decision rejecting the same challenges), the unlikelihood that the alleged violation affected any election results, and the district court's failure to make clear *ex ante* that the 2016 elections were for abbreviated terms.

As explained in the State's previously filed jurisdictional statement on the merits, the district court's underlying decision finding a constitutional violation is so fundamentally flawed that it should be summarily reversed. But no matter how this Court resolves the merits dispute, it should vacate the district court's *ultra vires* and unjustifiable remedial order.

OPINIONS BELOW

The opinion of the three-judge district court invalidating the challenged districts and requiring the State to enact a new districting plan before the next regularly scheduled elections is reported at 316 F.R.D. 117 and reproduced at App.1-147. The remedial order requiring a special election in 2017 is reported at 2016 WL 7667298 and reproduced at App.198-204.

JURISDICTION

The district court issued its final judgment on August 15, 2016. Appellants filed their notice of appeal on September 13, 2016. The district court issued its additional remedial order on November 29, 2016. Appellants filed their notice of appeal from that order on December 22, 2016. This Court has jurisdiction under 28 U.S.C. §1253, at least to the extent necessary to vacate the remedial order because the district court lacked jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause and the relevant provisions of the VRA are reproduced at App.206-11.

STATEMENT OF THE CASE

A. The 2011 Redistricting Process[1]

This appeal arises from the most recent round of state legislative redistricting in North Carolina. The redistricting process began in early 2011, when the legislature selected Senator Bob Rucho as Chair of the Senate Redistricting Committee and Representative David Lewis as Chair of the House Redistricting Committee. App.7-8. The Chairmen were not working from a blank slate. Since *Thornburg v. Gingles*, 478 U.S. 30 (1986), state legislative districting plans in North Carolina have included majority-minority districts where feasible to ensure that politically cohesive and geographically compact minority groups have an equal opportunity to elect their candidates of choice.

The Chairmen accordingly began the 2011 redistricting process by collecting evidence about the extent of racially polarized voting in jurisdictions covered by Section 5 of the VRA and in areas with significant minority populations. App.21-23. All the evidence they collected confirmed that racially polarized voting remains a reality in North Carolina and that, accordingly, the districting plan should include majority-minority districts to ensure compliance with Section 2 of the VRA. That evidence included two expert reports showing statistically significant racially polarized voting; three alternative districting plans (including one submitted by

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[1] The factual details of the underlying merits dispute are described in greater detail in the State's previously filed jurisdictional statement. *See* App.151-97.

plaintiffs' counsel in this case) that included either majority-minority or coalition districts throughout the State; public testimony confirming the presence of racially polarized voting; and past election results showing that minority-preferred candidates had substantial success in majority-minority and coalition districts, but almost no success in majority-white districts. *See* Def.Exhs. 3000, 3001, 3013-1, 3013-5, 3013-6, 3013-8, 3033.

The Chairmen hired Dr. Thomas Hofeller to draw the new districting plan and gave him three primary instructions. App.8. First, they informed him that the North Carolina Supreme Court's interpretation of the state constitution's Whole County Provision ("WCP") required that districts drawn to avoid a VRA violation be drawn before any other districts. App.20-23. Second, they told him that, pursuant to the North Carolina Supreme Court's decision in *Pender County v. Bartlett,* 649 S.E.2d 364 (N.C. 2007), and this Court's *Strickland* decision affirming *Pender*, he should endeavor to draw those districts as majority-minority districts. App.19-20. Third, the Chairmen instructed Dr. Hofeller to attempt to draw majority-minority districts in a number roughly proportional to the statewide minority population, but to do so only if the districts were reasonably compact. App.24-29.

Dr. Hofeller closely followed those instructions and created a districting map with 23 majority-minority House districts and nine majority-minority Senate districts. App.31-33. The Chairmen publicly released the plan in July 2011 and, after minor modifications, the plan was passed by the General

Assembly, signed by the Governor, and precleared by the Department of Justice. App.10-11.

B. State Court Litigation

In November 2011, two groups of plaintiffs filed suit in North Carolina state court alleging that 27 state legislative districts (including most of the majority-minority districts) and three federal congressional districts were unconstitutional racial gerrymanders. After a two-day bench trial, the three-judge panel unanimously rejected their claims in a 74-page opinion that incorporated and appended a 96-page appendix with detailed factual findings. *Dickson v. Rucho*, Nos. 11 CVS 16896, 11 CVS 16940 (N.C. Super. Ct. July 8, 2013). The plaintiffs appealed, and the North Carolina Supreme Court affirmed. *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014). The plaintiffs petitioned this Court for a writ of certiorari, and the Court granted, vacated, and remanded in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). *See Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (mem.). After further briefing and oral argument, the North Carolina Supreme Court affirmed again. *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015). Plaintiffs' petition for a writ of certiorari from that decision is pending. *Dickson v. Rucho*, No. 16-24. In the meantime, the challenged plan was used in the 2012 and 2014 elections.

C. Federal Court Litigation

After the North Carolina Supreme Court's first affirmance in *Dickson*—*i.e.*, almost four years after the legislature enacted the districting plan and after the State had used it in two rounds of elections—

plaintiffs filed suit in the U.S. District Court for the Middle District of North Carolina. Like the *Dickson* plaintiffs, they alleged that most of the majority-minority districts in the Senate and House plans were unconstitutional racial gerrymanders. App.13. Plaintiffs did not dispute that the legislature needed to take racial demographics into account in drawing these districts in order to comply with federal law; instead, they claimed that Section 2 of the VRA required the legislature to draw fewer majority-minority districts and more crossover or coalition districts. The court granted their request for a three-judge district court and held a five-day bench trial in April 2016. App.14. The parties submitted proposed findings of fact and conclusions of law in early May.

More than three months later, long after the North Carolina Supreme Court rejected the nearly identical redistricting challenges for the second time, the district court invalidated the House and Senate plans. The court began by disclaiming any suggestion that "the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts." App.3 n.1. Then, in a footnote, it tersely dismissed the State's argument that plaintiffs' claims were barred by *res judicata* or collateral estoppel in light of *Dickson*. App.13-14 n.9.

Turning to the merits, the court ruled that "race was the predominant factor motivating the drawing of all challenged districts." App.2, 14-113. It then addressed whether the districting legislation was narrowly tailored to serve the State's compelling interest in complying with Sections 2 and 5 of the VRA. App.113-42. The court rejected North

Carolina's Section 2 defense, holding that, even though no party to the litigation took the position that racially polarized voting was a thing of the past in North Carolina, the legislature lacked a strong basis in evidence to draw *any* of the challenged districts as ability-to-elect districts. App.121-35. In so holding, the court expressly declined to resolve plaintiffs' argument that the legislature should have drawn the districts as coalition districts rather than majority-minority districts. App.18 n.10. Instead, it held that the legislature "failed to demonstrate a strong basis in evidence for *any* potential Section 2 violation," *id.* (emphasis added), and thus should not have considered race *at all* in drawing the districts. As for Section 5, the court "conclude[d] that Defendants have not put forth a strong basis in evidence that any of [the districts in covered counties] were narrowly tailored to avoid retrogression." App.136.

The court then considered the appropriate remedy for the constitutional violation it found. Although plaintiffs had requested an immediate injunction blocking the use of the districts in the November 2016 election, the court determined that "there is insufficient time, at this late date, for: the General Assembly to draw and enact remedial districts; this Court to review the remedial plan; the state to hold candidate filing and primaries for the remedial districts; absentee ballots to be generated as required by statute; and for general elections to still take place as scheduled in November 2016." App.143. The court accordingly "decline[d] to order injunctive relief to require the state of North Carolina to postpone its 2016 general elections,"

instead allowing the elections to proceed as scheduled under the challenged maps. App.144. The court did, however, order the legislature to draw new maps for use in the next round of state legislative elections, which are scheduled for 2018. App.144-45. The district court's accompanying order expressly stated: "This judgment is final." App.149.

The same day, the district court ordered the parties to "meet and confer about the appropriate deadline for the North Carolina legislature to draw new districts, the question of whether additional relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and form of that relief." Dkt.124. All parties filed status reports three weeks later, advising the court that they were unable to reach any agreement. Dkt.128, 129. Defendants then timely filed a notice of appeal from the district court's final judgment, App.150, and a jurisdictional statement in this Court, *see North Carolina v. Covington*, No. 16-649 (filed Nov. 14, 2016), reproduced at App.151-97.[2]

D. The Subsequent Remedial Order

Nearly five million North Carolinians exercised their right to vote in the November 2016 election, all operating under the understanding (confirmed by the district court's final judgment and the absence of any subsequent order) that the normal rules applied and that they were voting for Representatives and

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[2] The jurisdictional statement is fully briefed and was distributed for the conference of January 19, 2017. This Court has not taken any action on the case since the conference.

Senators who would represent them for their constitutionally prescribed two-year terms.

Just three weeks after the results were in, however, the district court changed course and decided that the remedy it previously ordered was insufficient. *See* App.198-204. In addition to requiring the State to enact its new districting plan by March 15, 2017, App.202, the court declared that "[t]he term of any legislator elected in 2016 and serving in a House or Senate district modified by the General Assembly under the redistricting plan shall be shortened to one year," App.203, and ordered the State to "hold special primary and general elections in the fall of 2017" in every district that is modified in the new districting plan (an estimated 116 districts), App.204. The district court also cast aside the residency requirements in the state constitution, declaring that "[a]ny citizen having established their residence in a House or Senate district modified by the General Assembly under the redistricting plan as of the closing day of the filing period for the 2017 special election in that district shall be qualified to serve as Senator or Representative ... notwithstanding the requirement of Sections 6 and 7 of Article II of the North Carolina Constitution." App.203.

The district court did not explain the basis for its jurisdiction; nor did it purport to conduct any balancing of the equities, to consider the sovereign harms a special election would impose on the State, or to provide any explanation for why it waited until *after* the election results were in to inform voters that

the candidates for whom they voted would serve only one-year terms.

Defendants filed an emergency motion to stay the remedial order in the district court, Dkt.141, and then filed an emergency stay application in this Court, *North Carolina v. Covington*, No. 16A646. The district court denied a stay, but this Court granted a stay pending the timely filing and disposition of a jurisdictional statement. *See id.*

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION

The district court had neither jurisdiction nor justification to enter its extraordinary remedial order. The court lacked jurisdiction because the State already had filed its notice of appeal from the court's original final judgment when the court imposed its follow-on expanded remedy. The filing of a notice of appeal formally confers jurisdiction on the appellate court and divests the district court of jurisdiction. Here, the district court issued a final judgment declaring the districts unconstitutional and ordering the State to draw new a districting plan for use in future elections. Defendants timely filed a notice of appeal from that judgment, thereby divesting the district court of jurisdiction to modify its merits ruling or expand its injunction. The district court's subsequent remedial order, issued almost three months after defendants filed their notice of appeal, was therefore *ultra vires*.

Even if the district court had retained jurisdiction, its remedial order would still merit review and reversal, as it far exceeded the bounds of the court's equitable discretion. The standard remedy

for a *Shaw* violation is the one the district court initially ordered: requiring the State to redraw the districts for the next *regularly scheduled* election. Indeed, that has been the remedy for every *Shaw* violation this Court has ever found. Even assuming that federal courts have the power to invalidate past election results and order special elections to remedy *Shaw* violations, that power should be reserved for the most extraordinary of cases, and exercised only after careful balancing of the equities at stake. Here, the district court ordered a special election in a case that is extraordinary only because it is highly debatable whether any constitutional violation even occurred, and it did so without even considering the harms a special election would inflict on the State, its legislators, its voters, or this Court's orderly review.

The remedial order cannot stand. Whether because the district court lacked jurisdiction, or because it failed to conduct the required analysis, or because any even-handed analysis would militate against a special election—or because there was no constitutional violation in the first place—this Court should summarily reverse or note probable jurisdiction and vacate the remedial order.

I. The District Court Did Not Have Jurisdiction To Issue The Remedial Order.

The district court lacked jurisdiction to issue its remedial order because the State's previously filed notice of appeal divested it of power over the case. "The filing of a notice of appeal is an event of jurisdictional significance"—it confers jurisdiction on the appellate court and divests the district court of jurisdiction over the matters appealed. *Griggs v.*

Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). Accordingly, any "attempt by the district court to change the judgment after a notice of appeal from its ruling has been filed is ineffective." Stephen M. Shapiro et al., *Supreme Court Practice* §7.5, at 537 (10th ed. 2013). As soon as jurisdiction passes to the appellate court, "the district court generally lacks power to act," and any actions it attempts to take are "null and void." 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §3949.1 (4th ed. 2016).

This "black-letter rule" prevents "clashes between institutions that occupy different tiers within the federal judicial system." *United States v. Brooks*, 145 F.3d 446, 456 (1st Cir. 1998). Without it, appeals would become moving targets, with district courts free to modify decisions while they are under review. The rule also ensures fairness to the parties, "who might otherwise be forced ... to fight a 'two front war' for no good reason." *United States v. Diveroli*, 729 F.3d 1339, 1342-43 (11th Cir. 2013) (alteration in original). Thus, "to promote judicial economy and avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time," 20-303 James Wm. Moore et al., *Moore's Federal Practice* §303.32(1) (3d ed. 2016), a district court and an appellate court "should not attempt to assert jurisdiction over a case simultaneously," *Griggs*, 459 U.S. at 58.

To be sure, district courts retain the power to implement or enforce unstayed injunctions during the pendency of an appeal. District courts may, for example, supervise a continuing course of conduct,

Liddell v. Bd. of Educ., 73 F.3d 819, 822 (8th Cir. 1996), hold parties in contempt for violating previous orders, *Acevedo-Garcia v. Vera-Monroig*, 368 F.3d 49, 58 (1st Cir. 2004), or clarify the scope of previous orders, *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 589 (6th Cir. 1987). But courts draw a clear line between *enforcement* of an injunction and *expansion* of one, with the latter prohibited after the notice of appeal is filed. At that point, the district court may not decide new legal issues or expand upon previously ordered remedies. *City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 394-95 (6th Cir. 2007); *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734-36 (9th Cir. 1982).

This Court has applied and approved that rule on numerous occasions, including in cases on direct appeal and in redistricting cases. In *Donovan v. Richland County Association*, 454 U.S. 389 (1982), a Ninth Circuit panel attempted to alter its judgment after appellants had filed their notice of appeal to this Court. *Id.* at 390 n.2. This Court disregarded the altered judgment, explaining that "[t]he filing of the notice of appeal clearly divested the Court of Appeals of any jurisdiction that it otherwise had to decide the merits of this case." *Id.*

Similarly, in *Zimmer v. McKeithen*, 467 F.2d 1381 (5th Cir. 1972), after the defendants filed a notice of appeal from a court-ordered apportionment plan, the district court attempted to modify its order to encompass an alternative apportionment plan. The Fifth Circuit refused to consider the second order, ruling that it had been issued "without

jurisdiction" because it postdated the notice of appeal. *Id.* at 1382. The case later came before this Court, which noted approvingly that "the Court of Appeals vacated the [second] order on the ground that when the appeal was filed, the District Court lost jurisdiction over the case." *E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636, 638 n.4 (1976).

The same result should follow here. The district court issued its initial order and judgment on August 15, 2016. App.148-49. That order addressed both liability and remedy: It declared the challenged districts unconstitutional, enjoined future elections "until a new redistricting plan is in place," and ordered the State to "redraw new House and Senate district plans." *Id.* While the order also "retain[ed] jurisdiction to enter such orders as may be necessary ... to timely remedy the constitutional violation," it expressly stated that "[t]his judgment is final." *Id.* at 149. And the State filed its notice of appeal from that final judgment on September 13, 2016, App.150, placing the questions of liability and remedy squarely before this Court—and divesting the district court of jurisdiction over both.

From that point forward, while the district court retained (and still retains) the power to enforce its initial order by ensuring that the State draws new districts before the next scheduled election, the State's notice of appeal divested the district court of jurisdiction to expand the scope of relief. Yet by halving constitutionally prescribed terms and ordering the State to conduct special elections in 2017, the district court unquestionably exceeded its authority. Because the district court lacked

jurisdiction to issue its sweeping remedial order, this Court should vacate the order regardless of how it resolves the underlying merits dispute.[3]

II. The Extraordinary Remedy Of A Special Election Is Improper.

Even if the district court had jurisdiction to expand its original remedy, the remedial order would still be inappropriate and require vacatur. This case lacks the exceptional features that might justify invalidating past election results, truncating constitutionally prescribed legislative terms, and ordering off-year special elections in substantial parts of the State. Indeed, if the extraordinary remedy of a special election were appropriate here—where the legislature's good faith is not questioned by the district court, the districts were upheld by the State's highest court, and the alleged violation did not affect any election results—then special elections would be appropriate in *every* racial gerrymandering case. Yet the opposite rule has held sway: In every one of this

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[3] Under Fed. R. App. P. 4(a)(4), the timely filing of certain post-judgment motions suspends a previously filed notice of appeal until the district court rules on the motion. Rule 4(a)(4), however, does not apply in direct appeals to this Court. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 373 n.10 (1984). In all events, plaintiffs did not timely file any of the motions listed in Rule 4(a)(4). Moreover, even if their "Motion for Relief," Dkt.132, were construed as a motion "to alter or amend the judgment under Rule 59," Fed. R. App. 4(a)(4)(A)(iv), it would be untimely because it was filed more than 28 days after the district court's judgment, *see* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."); *see also* Fed. R. Civ. P. 6(b)(2) ("A court must not extend the time to act under [Rule 59(e)].").

Court's *Shaw* cases finding a violation, the remedy has been limited to ordering that new districting plans be used in the next regularly scheduled election. Neither plaintiffs nor the district court have identified anything about this case that would justify making it the first exception to that rule, and the equities weigh firmly against such a massive intrusion on state sovereignty.

A. Courts Must Exercise Extreme Caution and Carefully Weigh the Equities Before Ordering Special Elections.

The standard remedy for an unconstitutional districting scheme is the one the district court initially imposed: requiring the districts to be redrawn for use in the next scheduled election. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional," courts should "insure that no further elections are conducted under the invalid plan."). Indeed, neither this Court nor any other has remedied any of the *Shaw* violations this Court has found by unseating elected legislators or cutting their terms short; instead, the remedy in every one of this Court's *Shaw* cases has been limited to ordering that new districting plans be used in the next regularly scheduled election.

Just last month, for example, the district court on remand in *Alabama Legislative Black Caucus v. Alabama* ruled that twelve districts were racial gerrymanders and remedied that violation by enjoining "the use of these twelve districts in future elections." 2017 WL 378674 at *106 (M.D. Ala. Jan. 20, 2017) (Pryor, J.). The same remedy followed this

Court's decision in *Shaw v. Hunt*, 517 U.S. 899 (1996), where the district court ordered the State to enact a new districting plan for use in future elections. *See Hunt v. Cromartie*, 526 U.S. 541, 543 (1999). Likewise, the district court on remand from *Bush v. Vera* ordered the State to use a court-drawn map at the next general election to remedy the racial gerrymander. *Vera v. Bush*, 933 F. Supp. 1341, 1352 (S.D. Tex. 1996). And in *Miller v. Johnson*, this Court affirmed the district court's judgment enjoining future elections in the challenged district. *See Johnson v. Miller*, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995). In all of those cases, courts ordered prospective relief to ensure that no future elections were held in the unconstitutional districts, but declined to retroactively abrogate past election results or require special off-year elections.[4]

This unbroken line of cases makes clear that the presumptive remedy for a *Shaw* violation is the remedy the district court initially imposed in this case.

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[4] In fact, special elections are so rare that plaintiffs could identify at most two courts that *ever* have imposed that remedy for a *Shaw* violation—and even then, in readily distinguishable circumstances and in decisions that were not reviewed by this Court. In *Cousins v. City Council of Chicago*, 503 F.2d 912 (7th Cir. 1974), decided decades before *Shaw*, the Seventh Circuit noted (without actually reviewing or endorsing the remedy) that the district court ordered a special election in *a single city council ward* because of "purposeful" discrimination. In *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), after finding "overwhelming" evidence of racial gerrymandering, the district court ordered special elections in only 30 of the State's 170 districts, and also ordered that relief before the general election, thereby ensuring that voters and candidates were at least fully informed on election day. *Id.* at 1212.

The remedy of a special election, on the other hand, is a "drastic if not staggering" remedy that "courts should grant only under the most extraordinary of circumstances" (if ever). *Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 478 (7th Cir. 1986). A federal court's invalidation of a state election necessarily "implicates important concerns of federalism and state sovereignty," and no court should resort "to this intrusive remedy until it has carefully weighed all equitable considerations." *Id.*; *see also NAACP v. Hampton Cty. Election Comm'n*, 470 U.S. 166, 183 n.36 (1985) (directing district court to engage in "the equitable weighing process" to determine a remedy); *Reynolds*, 377 U.S. at 585 (relief should be "fashioned in the light of well-known principles of equity"); *Baker v. Carr*, 369 U.S. 186, 250 (1962) (Douglas, J., concurring) (same).

This Court has not set out the precise test that courts should apply when determining how to remedy a districting violation. But this Court's decisions in other voting cases, along with the decisions of the lower courts, highlight three considerations that guide the equitable inquiry.

First, district courts should not order special elections unless the legislature acted in bad faith or committed an egregious violation. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), for example, this Court considered the proper remedy for a State's failure to comply with Section 5's preclearance requirement. Plaintiffs asked the Court to "set aside the elections ... and order that new elections be held." *Id.* at 571. This Court, however, "decline[d] to take corrective action of such consequence" because the

case involved "issues subject to rational disagreement" and the State did not act in "deliberate defiance" of the VRA. *Id.* at 571-72; *see also Hampton Cty.*, 470 U.S. at 183 n.36 ("The factors to be weighed include ... 'whether it was reasonably clear at the time of the election that the changes were covered by §5.'").

Likewise, in *Lopez v. City of Houston*, 617 F.3d 336 (5th Cir. 2010), the Fifth Circuit rejected the plaintiffs' request to invalidate past election results, explaining that such an "extraordinary remedy ... can only be employed in exceptional circumstances, usually when there has been egregious defiance of the Voting Rights Act." *Id.* at 340. Because the plaintiffs "made no claim of the kind of egregious or invidious discrimination that would make invalidation of the 2009 election an appropriate remedy," the Fifth Circuit declined to grant the requested relief. *Id.*; *cf. Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967) (ordering special election because of "gross, unsophisticated, significant, and obvious racial discriminations" at the polling place).

Second, district courts should not order special elections unless plaintiffs can "demonstrate that the unconstitutional practice had a significant impact on the particular election they seek to have declared invalid." *Bowes v. Ind. Sec'y of State*, 837 F.3d 813, 818 (7th Cir. 2016). In *Hadnott v. Amos*, 394 U.S. 358 (1969), for instance, this Court held that Alabama violated Section 5 of the VRA by failing to obtain preclearance for a change in ballot eligibility rules that disqualified members of the National Democratic Party of Alabama (NDPA) from ballots for offices in Greene County. *Id.* at 365-66. To

remedy the violation, this Court ordered "a new election in Greene County," explaining that "NDPA candidates in Greene County would have won had they been on the ballot," as more ballots "were marked for the NDPA 'straight ticket'" than for any other candidate. *Id.* at 361, 367.

Conversely, in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit refused to order a special election after finding that the violation did not affect the election results. During the campaign, the State had violated a candidate's First Amendment rights by ordering him to cease and desist from distributing certain campaign materials. *Id.* at 1318-24. The candidate defied the unconstitutional order, but still lost the election. After the election, the court denied the plaintiff's request to invalidate the results, reasoning that there was no allegation of "voter fraud, vote dilution, or a similar scheme which would mandate a special election." *Id.* at 1325. The voters "were free to vote for their candidate of choice," and more voters chose the plaintiff's opponent. *Id.*; *see also Bowes*, 837 F.3d at 819 (special election might be appropriate if the challenged practice had a "significant impact" on the election, but not if it had "only *some* impact").

Third, a district court should not order a special election unless the special election's benefits outweigh "the state's significant interest in getting on with the process of governing once an electoral cycle is complete." *Bowes*, 837 F.3d at 818. A legislature "elected under an unfair apportionment scheme ... is nonetheless a legislature empowered to act." *Baker v. Carr*, 369 U.S. at 250 n.5 (Douglas, J.,

concurring). Special elections, however, "disrupt the decision-making process" and "place heavy campaign costs on candidates and significant election expenses on local government." *Gjersten*, 791 F.2d at 479. Those costs to governance "should not be cavalierly brushed away by other branches of government, whether federal or judicial, that neither pay it nor impose the tax burden on which a remedy depends." *United States v. City of Houston*, 800 F. Supp. 504, 506 (S.D. Tex. 1992) (three-judge panel). Moreover, the State "has an interest in placing a reasonable limit on the number of times voters are called to the polls," *Gjersten*, 791 F.2d at 479, thereby avoiding "voter confusion and consequent incentive to remain away from the polls," *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Courts therefore should not order special elections unless the benefits they produce will outweigh the costs they impose on governance and state sovereignty.

B. The Extraordinary Remedy of a Special Election Is Inappropriate in this Case.

This case does not come close to warranting the extraordinary remedy of a special election. At the outset, the remedial order should be vacated for the simple reason that the district court failed to meaningfully weigh any equitable considerations. Instead, it just summarily asserted: "While special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander." App.200. With that, the court declared that a "special election in the fall of 2017 is an appropriate remedy." *Id.* That conclusory

statement is no substitute for a meaningful balancing of the equities—or even a meaningful appreciation that the special-election remedy is extraordinary, rather than *de rigueur*, in *Shaw* cases. The court's breezy approach allowed it to avoid confronting the enormous intrusion on sovereign prerogatives that its order worked. The lack of analysis alone is grounds to vacate the remedial order. *See Gjersten*, 791 F.2d at 479 (reversing order requiring special election because "the district court did not adequately consider all the relevant equitable factors").

Had the district court considered the relevant equitable factors, it would have concluded that they foreclose a special election. First, as explained in greater detail in the State's first jurisdictional statement, far from being egregious, the alleged constitutional violation is highly debatable; at a minimum, it is certainly "subject to rational disagreement." *Allen*, 393 U.S. at 572; *see also infra* Part III. In fact, the North Carolina Supreme Court has twice upheld the challenged districts against identical constitutional attacks, concluding that "the enacted House and Senate plans ... satisfy state and federal constitutional and statutory requirements." *Dickson v. Rucho*, 781 S.E.2d 404, 441 (N.C. 2015); *see Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014). The state supreme court's decision should have foreclosed this follow-on federal case as a matter of claim preclusion and collateral estoppel, *see* App.172-76, but at a bare minimum, the disagreement between two co-equal courts should categorically preclude the use of a drastic remedy that is properly reserved for "gross, spectacular, completely indefensible" violations. *Bell*, 376 F.2d at 664.

Nor was this a case in which the legislature acted with discriminatory animus or in "deliberate defiance" of the Constitution. *Allen*, 393 U.S. at 571-72. To the contrary, the district court's merits decision expressly disclaimed any "finding that the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts," App.3 n.1, and its remedial order made no such finding either, *see* App.198-204. A State's good-faith effort to navigate the relatively narrow channel between the competing demands of the VRA and the Equal Protection Clause should not give rise to the extraordinary remedy of a special election, even if the good-faith effort is ultimately deemed unsuccessful.

Second, the district court did not—and could not—find that the alleged constitutional violation had a "significant impact" on election results in the challenged districts. *Gjersten*, 791 F.2d at 479. Plaintiffs themselves made no such claim in the district court or in their response to the State's stay application. Nor could they, as candidates in 20 of the 28 challenged districts ran *unopposed*, *see Official General Election Results*, North Carolina State Board of Elections (last visited February 20, 2017), http://bit.ly/2heSRbV, and among the eight contested seats, the *narrowest* margin of victory was 35 points. *See id.* Moreover, plaintiffs did not claim or submit any evidence that the alleged violations prevented any candidate from running or prevented any person from voting. *Cf. Hadnott*, 394 U.S. 358 (candidates excluded from ballot); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973) (voters deceived into voting for a particular candidate). Because there is no evidence or suggestion that the alleged violation

had *any* impact on the results—let alone a "significant" one—the drastic remedy of a special election is unwarranted.

Third, the limited benefits of a special election in these circumstances do not outweigh the State's sovereign interest "in getting on with the process of governing once an electoral cycle is complete." *Bowes*, 837 F.3d at 818. First, it is not clear that a special election would provide *any* benefit to voters in the challenged districts. As discussed, plaintiffs never claimed that the alleged violation changed the election results in those districts. It is thus little wonder that plaintiffs insisted that there also be special elections in the nearly 100 *un*challenged districts whose boundaries would be modified by a new map. Dkt.132 at 3; *see* Dkt.136 at 6. Holding special elections in the challenged districts alone could not provide plaintiffs' backers with any political gain, but getting a second chance at multiple contests in border districts throughout the State (especially with the distorted turnout inherent in off-year special elections) presents the possibility of unseating legislators from the other political party. That may be a "benefit" from plaintiffs' perspective, but providing ancillary benefits to plaintiffs' political party surely is not the sort of equitable consideration that supports a special election.

Moreover, it is highly debatable whether the type of abstract harm involved in racial gerrymandering cases would *ever* justify a special election. Racial gerrymandering claims are not about "voter fraud, vote dilution, or any similar scheme that would require a special election" to restore the franchise.

Weaver, 309 F.3d at 1318. In *those* contexts, a special election is at least a plausible (albeit extreme) cure for the type of ongoing harms at issue, as those kinds of violations have the potential to inflict ongoing representational harms throughout the constitutionally prescribed term. But *Shaw* claims are different. They are about the legislature's infliction of expressive harms by treating minority voters as if they "think alike, share the same political interests, and will prefer the same candidates at the polls" simply because of the color of their skin. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). The remedy for that type harm is not a special election that will unseat duly elected legislators wherever a zig in the enacted plan becomes a zag in the remedial one, but rather a judicial declaration of unconstitutionality and the creation of a new districting plan that does not inflict expressive harms—*i.e.*, the remedy the district court initially ordered, and the remedy that has been ordered in every case in which this Court has found a *Shaw* violation (indeed, in nearly every *Shaw* case, period).

On the other side of the ledger, the harms to governance caused by the remedial order are immense. Legislators, instead of acting for their constituents, would be required to spend a significant portion of their abbreviated terms designing and enacting a new districting plan. That process is guaranteed to be time-consuming, as the legislature must either collect even more robust evidence of racially polarized voting than it did the first time around, or risk the Section 2 litigation that inevitably will follow if it draws the districts without any consideration of race at all. That same dynamic

already played out with respect to the State's congressional districts: When the General Assembly drew a race-neutral congressional map to remedy the purported racial gerrymander in *Harris v. McCrory*, No. 15-1262, the plaintiffs turned around and accused the legislature of vote dilution for failing to pay *enough* attention to race. *See* Dist. Ct. Dkt.154-1, at 21-30. As that regrettably predictable result confirms, drawing maps that actually satisfy plaintiffs will be no easier this time around.

Moreover, because legislators would have to turn around and compete in special primary elections mere months later, they would be forced to do more campaigning and less governing than they otherwise would have, at the expense of the constituents they were elected to represent. And members with redrawn districts would have every incentive to neglect their current constituents and focus their efforts on voters in neighboring districts whose votes would count in the upcoming elections. And even after the special elections, the problems would recur, as the newly elected representatives would have only a one-year term and thus would once again have their attention diverted from governing to re-election the very next year.

Meanwhile, the elections board would be forced to spend its limited time and resources preparing for the special election, which is a months-long process with estimated costs in excess of $15 million. Dkt.136-3 at 12-13. That is an exceedingly high price to pay for elections that are unlikely to make any difference in the challenged districts, especially where the resulting legislative terms would last only

one year. *See Toney v. White*, 488 F.2d 310, 316 (5th Cir. 1973) (reversing remedial order "given both the expense of holding a special election and the short terms of office which would remain"). And because the financial and administrative cost of a special election is so high, "a jurisdiction forced into holding a special election has much less to spend on ... other necessities." *City of Houston*, 800 F. Supp. at 506.

A special election also would harm North Carolina voters. Because the district court waited until after the election results were in to announce its extraordinary remedy (even though it issued its merits decision and initial remedy all the way back in August, and plaintiffs first made their request for a special election in September), millions of voters went to the polls with the belief that the legislators they elected would serve two-year terms. The remedial order cuts those terms in half, effectively halving the voting power of millions of North Carolinians. That is true not just for legislators and voters in the challenged districts, but for those in any of the (at least) 116 districts that will be modified if remedial maps must be drawn.

Special elections would impose representational harms of their own as well, as turnout at special elections in North Carolina has historically been abysmal. *See* Dkt.136-3 at 15. Moreover, because this special election would not be statewide, it inevitably would "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. The timing of the remedial order also raises at least the appearance that if the elections results had been different, then the

remedial order might have been different. Even the possibility of voters drawing that conclusion weighs against this extraordinary order.

The district court's remedial order also harms the State's sovereign interests by unnecessarily abrogating multiple provisions of state law. No one has ever suggested that there is anything suspect about North Carolina's sovereign determinations that legislators should serve two-year terms or that candidates should live in the district they seek to represent for one year before an election. N.C. Const. art. II, §§6-8. Yet the district court's extraordinary remedy casts both those provisions aside without even acknowledging the legitimate and important public interests that they serve. Furthermore, the remedial order contradicts North Carolina's sovereign determination that special elections generally are not worth the time and expense. Under North Carolina law, vacancies that arise in the General Assembly due to resignation or death are filled not by a special election, but by Gubernatorial appointment, with the voters weighing in at the next regularly scheduled election. N.C. Gen. Stat. §163-11. By ordering a special election anyway, the district court failed to accord proper weight to the State's sovereign determination about how best to structure its own government. *Cf. Gjersten*, 791 F.2d at 479 (directing district court to "consider the legislative determination in Illinois that, when a vacancy occurs in the last twenty-seven months of a four year term, a special election need not be held").

Finally, the pendency of multiple *Shaw* cases, including the earlier appeal in this case, before this

Court, made the district court's demand that the State take immediate steps toward a special election particularly inappropriate. By imposing the special-election remedy when it knew that the underlying merits decision and initial remedial order were on appeal to this Court, the district court failed to respect this Court's appellate function. Whatever the merits of a special-election remedy in a case on remand from this Court or where the State has signaled it will not appeal the merits determination to this Court, a special-election remedy is particularly inappropriate when it will skew this Court's review of the merits. As noted, the State's appeal of the district court's earlier judgment divested the district court of jurisdiction to issue this more intrusive and problematic remedy. But jurisdictional difficulties aside, the district court plainly abused its discretion by failing to consider the impact of its special-election remedy on this Court's review. If this Court reverses the district court on the merits, as it should, *see infra*, then no remedy will be appropriate. If this Court provides further guidance in its merits review in this case or other pending *Shaw* cases, then those developments may also overtake the special-election remedy. Needless to say, this Court already ameliorated the harms of the special-election order by staying it, but the fact remains that the order wholly ignored the reality of this Court's appellate role. The special-election order effectively put this Court "on the clock," forcing it to either issue a stay or alter the timing of its deliberations in pending merits cases.

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Unless special elections are to become the go-to remedy for *Shaw* violations, the district court's remedial order cannot stand. Neither plaintiffs nor the district court have identified *anything* that makes this the extraordinary case in which a *Shaw* claim cannot be remedied by simply ordering new maps before the next regularly scheduled election. The legislature acted in good faith; the finding of a violation is tenuous at best; the alleged violation had no impact on election results; and the special election would work massive and unwarranted harms on the State and its citizens. This is thus the very last case in which the courts should resort to a remedy reserved for only the most egregious of violations.

III. There Was No Constitutional Violation To Remedy.

This Court also should vacate the remedial order for the simple reason that there was no constitutional violation to remedy in the first place, as more fully explained in the State's previously filed jurisdictional statement. App.151-97.

At the outset, this second-in-time, federal-court case should have been barred as a matter of *res judicata* and collateral estoppel. Before this lawsuit was filed, a three-judge panel of the North Carolina state trial court had already rejected claims identical to those at issue here, *see Dickson v. Rucho*, Nos. 11 CVS 16896, 11 CVS 16940 (N.C. Super. Ct. July 8, 2013), and the North Carolina Supreme Court has since affirmed that decision twice, *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015); *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014). To allow plaintiffs and the organizations behind this litigation to take a second

bite at the apple in federal court would be unfair to the State as a litigant and demeaning to the State as a sovereign, as it would allow a federal court to ignore the factual findings of a co-equal state court and to effectively overrule a decision by the state supreme court. *See* App.172-76.

Having decided to second-guess the state supreme court, the district court then erred in concluding that race predominated. Strict scrutiny does not apply simply because a districting plan contains majority-minority districts. Rather, challengers must prove that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). Here, the court's own assumptions reveal that the race did not predominate over other districting goals. For instance, the court assumed (as the North Carolina Supreme Court twice held) that the districts complied with the Whole County Provision. App.22. Yet it failed to realize that compliance with the WCP is itself proof that race did not predominate, and that the WCP serves the traditional districting principles of "compactness, contiguity, and respect for political subdivisions." *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002). By applying strict scrutiny just because majority-minority districts were involved, the court failed to hold plaintiffs to their demanding burden of proving that race "*predominantly* explains" a district's boundaries." *Easley v. Cromartie*, 532 U.S. 234, 243 (2001). *See* App.176-79.

Even assuming strict scrutiny applied, the district court plainly erred in reaching its astounding

conclusion that the legislature did not have good reasons to fear "any potential Section 2 violation," App.18 n.10, and thus should not have considered race *at all*. Even plaintiffs have never made the extraordinary argument that there is no longer a single region in North Carolina where the legislature must draw ability-to-elect districts. But the district court went far beyond plaintiffs' actual claims and concluded that the legislature lacked good reasons to fear *any* Section 2 liability, and thus lacked good reasons to draw *either* majority-minority *or* coalition or crossover districts in regions that have had one or the other for decades. App.2-3, 18 n.10.

That holding is demonstrably wrong. The legislature had more than enough evidence to justify its conclusion that Section 2 required ability-to-elect districts in the same counties and regions in which they had long appeared. The legislature received uncontradicted evidence confirming the existence of racially polarized voting in all of the relevant regions. That evidence would have sufficed to prove that sufficient racially polarized voting to create a VRA problem *actually* exists, and it plainly sufficed to prove that the legislature had a "strong basis" for reaching that conclusion.

Indeed, plaintiffs themselves have never denied that they believe the State would violate Section 2 if it failed to draw the challenged districts as crossover or coalition districts—in other words, if it eschewed consideration of race entirely. And notwithstanding its conclusion that the legislature violated the Equal Protection Clause by drawing the challenged districts as majority-minority districts, the district court then

bite at the apple in federal court would be unfair to the State as a litigant and demeaning to the State as a sovereign, as it would allow a federal court to ignore the factual findings of a co-equal state court and to effectively overrule a decision by the state supreme court. *See* App.172-76.

Having decided to second-guess the state supreme court, the district court then erred in concluding that race predominated. Strict scrutiny does not apply simply because a districting plan contains majority-minority districts. Rather, challengers must prove that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). Here, the court's own assumptions reveal that the race did not predominate over other districting goals. For instance, the court assumed (as the North Carolina Supreme Court twice held) that the districts complied with the Whole County Provision. App.22. Yet it failed to realize that compliance with the WCP is itself proof that race did not predominate, and that the WCP serves the traditional districting principles of "compactness, contiguity, and respect for political subdivisions." *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002). By applying strict scrutiny just because majority-minority districts were involved, the court failed to hold plaintiffs to their demanding burden of proving that race "*predominantly* explains" a district's boundaries." *Easley v. Cromartie*, 532 U.S. 234, 243 (2001). *See* App.176-79.

Even assuming strict scrutiny applied, the district court plainly erred in reaching its astounding

conclusion that the legislature did not have good reasons to fear "any potential Section 2 violation," App.18 n.10, and thus should not have considered race *at all*. Even plaintiffs have never made the extraordinary argument that there is no longer a single region in North Carolina where the legislature must draw ability-to-elect districts. But the district court went far beyond plaintiffs' actual claims and concluded that the legislature lacked good reasons to fear *any* Section 2 liability, and thus lacked good reasons to draw *either* majority-minority *or* coalition or crossover districts in regions that have had one or the other for decades. App.2-3, 18 n.10.

That holding is demonstrably wrong. The legislature had more than enough evidence to justify its conclusion that Section 2 required ability-to-elect districts in the same counties and regions in which they had long appeared. The legislature received uncontradicted evidence confirming the existence of racially polarized voting in all of the relevant regions. That evidence would have sufficed to prove that sufficient racially polarized voting to create a VRA problem *actually* exists, and it plainly sufficed to prove that the legislature had a "strong basis" for reaching that conclusion.

Indeed, plaintiffs themselves have never denied that they believe the State would violate Section 2 if it failed to draw the challenged districts as crossover or coalition districts—in other words, if it eschewed consideration of race entirely. And notwithstanding its conclusion that the legislature violated the Equal Protection Clause by drawing the challenged districts as majority-minority districts, the district court then

turned around and suggested that the VRA may in fact compel the legislature to do exactly that. *See* App.145. The district court's decision thus leaves North Carolina in precisely the untenable position this Court has sought to avoid: "trapped between the competing hazards of liability" under the VRA and the Constitution. *Bush v. Vera*, 517 U.S. 952, 977 (1996). *See* App.179-96.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction and vacate the district court's remedial order.

Respectfully submitted,

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February 21, 2017

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Appendix A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:15-cv-399

SANDRA LITTLE COVINGTON, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

Filed: August 11, 2016

MEMORANDUM OPINION

Circuit Judge James A. Wynn, Jr., wrote the opinion, in which District Judge Thomas D. Schroeder and District Judge Catherine C. Eagles joined:

More than two decades ago, the Supreme Court considered a legal challenge to election districts that assigned voters to districts primarily on the basis of race. *Shaw v. Reno* (*Shaw I*), 509 U.S. 630 (1993). In holding that the plaintiffs had stated a claim under the Equal Protection Clause of the Fourteenth Amendment, the Court explained that racial gerrymandering "reinforces the perception that members of the same racial group . . . think alike,

share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. Race-based districting also sends the "pernicious" message to representatives that "their primary obligation is to represent only the members of [a single racial] group." *Id.* at 648. In light of these harms, the Supreme Court later invalidated the redistricting plan. *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 902 (1996).

Plaintiffs charge that in 2011 the North Carolina General Assembly created State House and Senate redistricting plans through the predominant and unjustified use of race. Defendants contend that race was not the primary factor used in the redistricting, and that even if it was, their use of race was reasonably necessary to serve a compelling state interest—namely, compliance with Section 2 and Section 5 of the Voting Rights Act ("VRA").

After careful consideration of the evidence presented, we conclude that race was the predominant factor motivating the drawing of all challenged districts. Moreover, Defendants have not shown that their use of race to draw any of these districts was narrowly tailored to further a compelling state interest. In particular, Defendants have not shown that their use of race was reasonably necessary to remedy a violation of Section 2 of the VRA, since they have not demonstrated that any challenged district was drawn with a strong basis in evidence that the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Similarly, Defendants have not

provided a strong basis in evidence demonstrating that their use of race was reasonably necessary to comply with Section 5, i.e., to prevent "retrogression in respect to racial minorities' 'ability . . . to elect their preferred candidates of choice.'" *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015) (quoting 52 U.S.C. § 10304(b)).

Because Defendants have failed to demonstrate that their predominant use of race was reasonably necessary to further a compelling state interest, the twenty-eight challenged districts in North Carolina's 2011 State House and Senate redistricting plans constitute racial gerrymanders in violation of the Equal Protection Clause of the United States Constitution. We therefore must order that new maps be drawn.[1]

This opinion proceeds as follows: Part I outlines the federal and state legal background relevant to redistricting in North Carolina, the 2011 redistricting process, and the litigation stemming from the 2011 redistricting. Part II analyzes statewide and district-specific evidence regarding the use of race in the 2011 redistricting, finding that race-based criteria predominated over race-neutral

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[1] In reaching this conclusion, we make no finding that the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts, which were precleared by the Justice Department pursuant to Section 5 of the VRA. Nor do we consider whether the challenged districts involved any impermissible "packing" of minority voters, as Plaintiffs acknowledge that they bring no such claim. Finally, we do not reach the issue of whether majority-minority districts could be drawn in any of the areas covered by the current districts under a proper application of the law. *See infra* Part V.

criteria in creating the challenged districts. Part III concludes that the race-based districting does not survive strict scrutiny because Defendants have failed to show a strong basis in evidence that their use of race was reasonably necessary to comply with the VRA. Part IV addresses the proper remedy.

I. Factual and Procedural Background

A. Legal Context for Redistricting

Every ten years, the North Carolina General Assembly—comprised of the North Carolina House of Representatives and the North Carolina Senate—must conduct a statewide redistricting based on the latest decennial census. N.C. Const. art. II, §§ 3, 5. Redistricting legislation must comply with a complex array of federal and state legal requirements, all of which combine to make redistricting perhaps "the most difficult task a legislative body ever undertakes." *Page v. Va. State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *7 (E.D. Va. June 5, 2015) (quoting *Smith v. Beasley*, 946 F. Supp. 1174, 1207 (D.S.C. 1996)), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

Federal election law requirements include the one person, one vote standard, *see Baker v. Carr*, 369 U.S. 186 (1962), and the provisions of the VRA. Section 2 of the VRA, as relevant to this case, prohibits redistricting plans that result in vote dilution, which occurs when "based on the totality of circumstances, it is shown that . . . members of a [protected group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

Section 5 of the VRA applies only to covered jurisdictions and prohibits retrogression, i.e., the adoption of any electoral change affecting a covered jurisdiction "that has the purpose of or will have the effect of diminishing the ability of any [protected group] to elect their preferred candidates of choice." *Id.* § 10304(b). Because the Supreme Court invalidated the criteria used to determine which jurisdictions are covered by Section 5's requirements, *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013), no North Carolina jurisdictions remain subject to Section 5. However, during the 2011 redistricting and prior to *Shelby County*, forty North Carolina counties were subject to those requirements, meaning that any state laws affecting voting in those jurisdictions, including new election districts, had to be precleared as non-retrogressive by the Justice Department or a three-judge panel of the U.S. District Court for the District of Columbia. *See* 52 U.S.C. §§ 10303-10304; 28 C.F.R. pt. 51 app. (2016).

Finally, any state legislative redistricting plan must also comply with various state legal requirements. The North Carolina Constitution's "Whole-County Provision" (the WCP) requires that "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), or "representative district," *id.* § 5(3). Because this proscription is often impossible to implement without violating federal law, the Supreme Court of North Carolina has reinterpreted the WCP to require that redistricting planners group counties together in drawing districts, generally keeping such groups as small as possible and minimizing the number of traverses across county boundaries within groups.

See Stephenson v. Bartlett (*Stephenson I*), 562 S.E.2d 377, 396-98 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247, 250-51 (N.C. 2003); *see also infra* section II.A.1.b.

B. Factual Context for Redistricting

Between 1991 and 2010, the number of "majority-black districts"—i.e., districts with a black voting-age population ("BVAP") above fifty-percent—in North Carolina's state House and Senate districting plans gradually declined.[2] In the House, for instance, between 1991 and 2010, the number of majority-black districts decreased from a high of thirteen in 1991 to a low of nine starting in 2002. Defs.' Ex. 3001 at 19-24, 42-48, 83-87, 143-50, 227-34, 298-300, 315-17 (Historical House Maps 1991-2010). Similarly, in the Senate, the number of majority-black districts decreased from four in 1991 to zero beginning in 2003. Defs.' Ex. 3000 at 18-20, 30-32, 46-47, 73-76, 116-19, 151 (Historical Senate Maps 1991-2010). The redistricting plan that was in place in the House at the time of the 2011 redistricting (the "Benchmark House Plan") was enacted in 2009, and as drawn it had nine majority-black districts.[3] Defs.' Ex. 3001 at 315-17. The "Benchmark Senate Plan,"

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[2] As used in this opinion, and in accordance with the statistics utilized by Defendants throughout the redistricting process, "BVAP" refers to the "total black" portion of the voting-age population, i.e., the portion that is "any-part black."

[3] The benchmark districts corresponding to the House districts challenged in this case were not changed between the 2003 and 2009 House redistricting plans. Thus, for the purposes of this opinion, the term "Benchmark House Plan" accurately refers to both the 2003 and 2009 House redistricting plans.

enacted in 2003, had zero majority-black districts. Defs.' Ex. 3000 at 151.

Many African-American General Assembly candidates, however, had electoral success even when running in non-majority-black districts. African-American candidates certainly experienced losses in such districts, but their overall success was significant. For example, in the three election cycles preceding the 2011 redistricting, African-American candidates for the North Carolina House won thirty-nine general elections in districts without a majority BVAP (including eleven such elections in 2010 alone), and African-American candidates for the North Carolina Senate won twenty-four such elections (including seven such elections in 2010). Defs.' Ex. 3020-14 at 2-5 (North Carolina House of Representatives Election Contest Winners); Defs.' Ex. 3001 at 315-17; Defs.' Ex. 3020-13 at 2-3 (North Carolina Senate General Election Winners); Defs.' Ex. 3000 at 151.

C. The 2011 Redistricting Process

The redistricting process at issue here began and ended within the 2011 calendar year. On January 27, 2011, Senator Robert Rucho was appointed Chair of the Senate Redistricting Committee. Second Joint Stip. ¶ 1, ECF No. 80; Defs.' Ex. 3013 at 2 (Aff. of Robert Rucho in *Dickson v. Rucho*). On February 15, 2011, Representative David Lewis was appointed Chair of the parallel House Redistricting Committee.[4] Second Joint Stip. ¶ 1; Defs.' Ex. 3037 at

[4] The House also appointed Representatives Nelson Dollar and Jerry Dockham as redistricting chairs, but Representative

2 (Aff. of David Lewis in *Dickson v. Rucho*). Together, Senator Rucho and Representative Lewis (the "Redistricting Chairs" or "Chairs") were "effectively . . . the manager[s] of the [redistricting] process," Trial Tr. vol. III, 119:1-4 (Lewis), and they "worked very closely" with each other throughout that effort, Defs.' Ex. 3013 at 2 (Rucho).

Although the Redistricting Chairs led the redistricting, they did not actually draw the maps. That work was done by Dr. Thomas Hofeller, whom the General Assembly's private counsel engaged to design the 2011 redistricting plans. Second Joint Stip. ¶ 3. Dr. Hofeller was to be the "chief architect" of the plans. Trial Tr. vol. IV, 41:22-24 (Rucho); Second Joint Stip. ¶ 6; Joint Ex. 1051 at 71. In other words, the Chairs would rely on him to translate their policy directives into actual districts. Trial Tr. vol. IV, 17:21-18:3 (Rucho); *see also id.* at 41:11-16 ("Dr. Hofeller was given clear instructions as to what was required of him . . . just as much as I would do if I were asking an architect to build my home.").

In March 2011, soon after receiving the 2010 census data, Dr. Hofeller began his work. Second Joint Stip. ¶ 5. The Redistricting Chairs were the only ones who gave him instructions, *see* Trial Tr. vol. IV, 216:2-9 (Hofeller); Second Joint Stip. ¶ 7, and they only communicated with Dr. Hofeller orally, Trial Tr. vol. III, 199:5-8 (Lewis); Trial Tr. vol. IV, 216:2-9 (Hofeller).

Lewis was the "senior chair and the manager of the process" in the House. Trial Tr. vol. III, 119:1-4 (Lewis).

It appears that no one besides the two Chairs and Dr. Hofeller had any substantive role in designing the 2011 districts. Dr. Hofeller never attended a Redistricting Committee meeting or reviewed any Redistricting Committee meeting transcripts. Trial Tr. vol. V, 89:5-10 (Hofeller). The Redistricting Committees did not participate in defining redistricting criteria for Dr. Hofeller, nor were Dr. Hofeller's draft maps presented to the Redistricting Committees for their input prior to public release. Trial Tr. vol. III, 213:17-23 (Lewis); Defs.' Ex. 3013-1 at 1-3 (Timeline of 2011 Redistricting Process); Joint Ex. 1022 at 37 (June 15, 2011, Joint Redistricting Committee Meeting) (Rep. Joe Hackney). Dr. Hofeller did not attend any of the public hearings on redistricting, review any transcripts of those hearings, or confer with anyone other than Representative Lewis and Senator Rucho about the redistricting. Trial Tr. vol. V, 88:23-89:4, 89:11-16 (Hofeller).

The Redistricting Chairs instructed Dr. Hofeller to begin the line-drawing process by identifying geographically compact minority populations and then drawing majority-minority districts in those locations, where possible, so that African-American voters would have a roughly proportional opportunity statewide to elect their preferred candidates of choice. Trial Tr. vol. V, 96:7-97:15 (Hofeller). They termed these majority-minority districts "VRA districts," which they considered to be districts with geographically compact, politically cohesive minority populations, where there was some evidence of racially polarized voting. Trial Tr. vol. III, 222:23-223:24 (Lewis); *see also* Trial Tr. vol. IV, 49:1-17

(Rucho). The Chairs instructed Dr. Hofeller that each of these districts was to have at least 50%-plus-one BVAP. *See infra* section II.A.1.[5]

On June 17, 2011, as the first step in making Dr. Hofeller's plans public, the Chairs released a map for both the House and Senate (the "VRA maps")[6] that included only the purported "VRA districts" they claimed were necessary for compliance with the VRA. Second Joint Stip. ¶ 8; Defs.' Ex. 3013-1 at 2, 3. On July 12, the Chairs proposed full House and Senate redistricting plans to the public. Second Joint Stip. ¶ 11; Defs.' Ex. 3013-1 at 2, 3.

On July 20, a slightly modified version of that full Senate plan ("Rucho Senate 2") was released to the public and, the following day, presented to the Senate Redistricting Committee. Second Joint Stip. ¶ 12; Defs.' Ex. 3013-1 at 3. On July 25 and July 27, the Senate and House, respectively, passed that modified plan. Second Joint Stip. ¶¶ 15-16; Defs.' Ex. 3013-1 at 4-5.

A similarly streamlined sequence of proposal and passage unfolded in the House. After a full House

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[5] The Chairs—and not any court or regulator—designated these "VRA districts" as such. The Chairs' use of the term "VRA district" reflected their stated goal of complying with the VRA. Throughout this opinion, our use of the Chairs' term "VRA district" in no way indicates this court's view, one way or the other, regarding whether the VRA required such districts.

[6] Throughout this opinion, "Senate VRA map" refers to "Rucho Senate VRA Districts." Joint Ex. 1001. "House VRA map" refers to "Lewis House VRA - Corrected," Joint Ex. 1002, which was released June 21 and reflects an immaterial change to the June 17 map, Defs.' Ex. 3013-1 at 3; *infra* note 30.

plan was released to the public on July 12, a slightly modified version of that plan ("Lewis-Dollar-Dockham 2") was released to the public on July 20 and presented to the House Redistricting Committee the following day. Second Joint Stip. ¶ 17; Defs.' Ex. 3013-1 at 3. The full House passed that plan on July 25. *Id.* After a few further modest revisions made by the Senate Redistricting Committee, the full Senate approved the House plan (later termed "Lewis-Dollar-Dockham 4") on July 27. Second Joint Stip. ¶¶ 20-21; Defs.' Ex. 3013-1 at 3.

Rucho Senate 2 (the "Enacted Senate Plan") became law on July 27, 2011. Second Joint Stip. ¶ 16; Defs.' Ex. 3013-1 at 4; *see* 2011 N.C. Sess. Law 402. Lewis-Dollar-Dockham 4 (the "Enacted House Plan") became law on July 28, 2011.[7] Second Joint Stip. ¶ 22; Defs.' Ex. 3013-1 at 2; *see* 2011 N.C. Sess. Laws 404. Those plans were subsequently precleared by the Justice Department pursuant to Section 5 of the VRA.

In short, within a month-and-a-half, Dr. Hofeller's draft maps were released in near-final form to the public, presented to the Redistricting Committees, and passed without significant modification by the General Assembly. And because those maps were the work of Dr. Hofeller, who was in turn directed only by the two Redistricting Chairs, it is clear that three individuals substantially carried out North Carolina's 2011 statewide redistricting effort. *See* Trial Tr. vol. III, 213:24-214:2 (Lewis)

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[7] Together, we refer to the Enacted House Plan and the Enacted Senate Plan as the "Enacted Plans."

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In short, within a month-and-a-half, Dr. Hofeller's draft maps were released in near-final form to the public, presented to the Redistricting Committees, and passed without significant modification by the General Assembly. And because those maps were the work of Dr. Hofeller, who was in turn directed only by the two Redistricting Chairs, it is clear that three individuals substantially carried out North Carolina's 2011 statewide redistricting effort. *See* Trial Tr. vol. III, 213:24-214:2 (Lewis)

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[7] Together, we refer to the Enacted House Plan and the Enacted Senate Plan as the "Enacted Plans."

("[Q:] [W]ith only a few minor changes, those districts, your districts and Dr. Hofeller's districts, became the law of North Carolina, didn't they? [A:] Yes, sir.").

D. Litigation Challenging the 2011 Enacted Plans

In November 2011, two sets of plaintiffs collectively challenged in North Carolina state court twenty-seven state House and Senate districts, as well as three Congressional districts, alleging that they were unconstitutional racial gerrymanders. *See* Mem. in Supp. of Mot. to Stay, Defer, or Abstain Ex. 1, at 7, 15, N.C. Superior Ct. Op. in *Dickson v. Rucho*, ECF No. 32. A three-judge panel was appointed, the two cases were consolidated, and a two-day bench trial was held in June 2013. *Id.* at 7-8. In July 2013, the court issued a decision upholding the challenged districts. *Id.* at 48-49.

The Supreme Court of North Carolina affirmed the trial court's judgment. *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014). The U.S. Supreme Court then granted certiorari, vacated, and remanded the case for further consideration in light of Alabama, 135 S. Ct. 1257. *Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (Mem). On December 18, 2015, the North Carolina Supreme Court reaffirmed the trial court's judgment. *Dickson v. Rucho*, 781 S.E.2d 404, 410-11 (N.C. 2015).

Meanwhile, in October 2013, two plaintiffs uninvolved in the *Dickson* litigation brought suit in federal district court, alleging that two Congressional districts drawn during the 2011 redistricting were racial gerrymanders. *Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 482052, at *6 (M.D.N.C. Feb. 5,

2016), *prob. juris. noted*, No. 15-1262, 2016 WL 1435913 (U.S. June 27, 2016). After the appointment of a three-judge panel, a three-day bench trial was held in October 2015. *Id.* That court found, on February 5 of this year, that both challenged Congressional districts were unconstitutional racial gerrymanders, and it ordered the General Assembly to draw remedial districts. *Id.* at *2, *21.

Plaintiffs, who are thirty-one U.S. citizens registered to vote in North Carolina,[8] brought this action on May 19, 2015, against the State of North Carolina, the Redistricting Chairs, the North Carolina Board of Elections, and other state officials. Compl., ECF No. 1; First Am. Compl. ¶¶ 10-49, ECF No. 11.

Plaintiffs allege that North Carolina Senate Districts 4, 5, 14, 20, 21, 28, 32, 38, and 40 and North Carolina House of Representatives Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107 (together the "challenged districts") are racial gerrymanders in violation of the Equal Protection Clause. First Am. Compl. ¶ 1. Each of the challenged districts was included as a purported "VRA district" in the House and Senate VRA maps released on June 17, 2011. Plaintiffs seek a judgment declaring unconstitutional the challenged districts and a permanent injunction blocking their use.[9] First Am. Compl. at 92.

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[8] Plaintiffs collectively reside in each of the challenged districts. Second Joint Stip. ¶¶ 35-65.

[9] We reject Defendants' contention that Plaintiffs' claim is barred by res judicata as a result of the Supreme Court of North Carolina's decision in *Dickson*, 781 S.E.2d 404. Under North

Because the Plaintiffs' action "challeng[es] the constitutionality of . . . the apportionment of a[] statewide legislative body," 28 U.S.C. § 2284(a), the Chief Judge of the U.S. Court of Appeals for the Fourth Circuit granted Plaintiffs' request for a three-judge panel on August 18, 2015. Order, ECF No. 18. After an expedited discovery period, this court held a five-day bench trial from April 11 to April 15, 2016. The issues are now ready for our consideration.

II. Analysis of Evidence of Racial Predominance

At the outset of our analysis, it is important to emphasize that a finding that race was the predominant motive in drawing a district does not automatically render that district unconstitutional. Nor does it signify that the legislature acted in bad faith or with discriminatory intent in its redistricting. Indeed, redistricting legislatures will almost always be aware of racial demographics, but "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw I*, 509 U.S. at 646.

Carolina law, which governs here, *see Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 375 (1985), the doctrine of res judicata applies only where the parties in a later case are the same as or in privity with the parties in a prior case, *Williams v. Peabody*, 719 S.E.2d 88, 94 (N.C. Ct. App. 2011). Recognizing none of the Plaintiffs in this action was either a plaintiff in the *Dickson* litigation or in privity with one, Defendants argue that the exception to privity recognized in *Thompson v. Lassiter*, 97 S.E.2d 492 (N.C. 1957), applies. However, Defendants have not produced sufficient evidence to prove the elements of the *Lassiter* exception. *See Williams*, 719 S.E.2d at 94-95.

As it must in do when undertaking any official action, a state must draw electoral districts in accordance with equal protection principles. *Miller v. Johnson*, 515 U.S. 900, 905 (1995). Consequently, if Plaintiffs show that race predominated over traditional race-neutral redistricting principles, we apply strict scrutiny, and Defendants have the burden of "show[ing] not only that [their] redistricting plan was in pursuit of a compelling state interest, but also that '[their] districting legislation is narrowly tailored to achieve [that] compelling interest.'" *Shaw II*, 517 U.S. at 908 (quoting *Miller*, 515 U.S. at 920).

In proving whether race predominated in a racial gerrymandering case, a plaintiff's burden is a "demanding one," *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 241 (2001) (quoting *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)), because "the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence," *id.* at 242. Specifically, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Alabama*, 135 S. Ct. at 1267 (quoting *Miller*, 515 U.S. at 916). In general, that requires proof that "the legislature subordinated traditional race-neutral districting principles, including . . . compactness, contiguity, and respect for political subdivisions . . . to racial considerations." *Miller*, 515 U.S. at 916. Put differently, the predominance of racial considerations is evident

where "[r]ace was the criterion that, in the State's view, could not be compromised," such that traditional districting principles were applied "only after the race-based decision had been made." *Shaw II*, 517 U.S. at 907.

In evaluating whether racial considerations predominated in a districting decision, the Supreme Court has considered both direct and circumstantial evidence of legislative intent, including statements by legislators identifying race as a chief districting criterion, *see Miller*, 515 U.S. at 917-18; indications that attaining a racial percentage within a given district was nonnegotiable, *see Shaw II*, 517 U.S. at 906-07; bizarre or non-compact district shape, *see Shaw I*, 509 U.S. at 646-48; and district lines that cut through traditional geographic boundaries or local election precincts, *see Bush v. Vera*, 517 U.S. 952, 974 (1996) (plurality opinion). Moreover, in light of *Alabama*, we are mindful that a legislature's "policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote)" provides particularly strong evidence of racial predominance. 135 S. Ct. at 1267.

As elaborated below, we find evidence of all of the above here.

A. Analysis of Statewide Evidence of Racial Predominance

Although racial gerrymandering claims are properly brought district by district, evidence that applies statewide—especially direct evidence revealing legislative intent—will frequently also be material. *See Alabama*, 135 S. Ct. at 1265. Therefore, before proceeding to an analysis of the particular

geographic and demographic features of individual districts, we begin by considering evidence relevant to all challenged districts.

1. The Chairs' Redistricting Criteria and Instructions to Dr. Hofeller

There is overwhelming and consistent evidence before us as to the intentions of the Enacted Plans' authors. The primary criteria that guided North Carolina's 2011 redistricting were articulated repeatedly and with little variation by the Chairs throughout the redistricting process and have been affirmed under oath by the Chairs and Dr. Hofeller on numerous occasions since. These countless statements show without real dispute that there were three main instructions the Chairs gave to Dr. Hofeller about redistricting. All three instructions centered around the creation of what the Chairs called "VRA districts," which, as noted above, *see supra* section I.C, the Chairs considered to be districts with geographically compact, politically cohesive minority populations where there was some evidence of racially polarized voting. The Chairs instructed Dr. Hofeller (1) to draw each of these VRA districts with at least 50%-plus-one BVAP; (2) to draw these districts first, before drawing the lines of other districts; and (3) to draw these districts everywhere there was a minority population large enough to do so and, if possible, in rough proportion to their population in the state.

a. VRA Districts at 50%-Plus-One BVAP

First, the Redistricting Chairs instructed Dr. Hofeller to draw all purported VRA districts to reach a 50%-plus-one BVAP threshold. Trial Tr. vol. V,

97:9-11 (Hofeller) ("[Q:] [Y]ou were . . . instructed to draw each VRA district at 50 percent plus one or greater; isn't that correct? [A:] If possible, yes."); Trial Tr. vol. III, 201:19-21 (Lewis) ("[Q:] You told [Dr. Hofeller] to draw the [VRA] districts at more than 50 percent [BVAP]; right, Representative Lewis? [A:] I believe that would be correct, yes, sir."); Joint Ex. 1018 at 28 (July 21, 2011, House Redistricting Committee Meeting Transcript) (Lewis) ("[W]e felt that it was a prudent course of action to draw the districts that we were going to call and think of as VRA districts at 50 percent plus one."); Joint Ex. 1013 at 10 (July 21, 2011, Senate Redistricting Committee Meeting Transcript) (Rucho) ("[I]n constructing the VRA districts, the Chairs recommended, where possible, these districts be drawn at a level equal to 50 percent plus one BVAP."); Joint Ex. 1015 at 94-95 (July 25, 2011, Senate Floor Session) (Rucho) ("In the absence of any . . . legal or factual basis for not doing so, we have decided to draw all of our Voting Rights Act districts at a 50 percent-plus level.").

The Chairs' 50%-plus-one instruction was based on their interpretation of the plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which they took to mean "that if you were going to draw districts to comply with the Voting Rights Act . . . the districts had to exceed 50 percent in minority population." Trial Tr. vol. III, 120:20-23 (Lewis).[10]

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[10] In light of our conclusion that Defendants failed to demonstrate a strong basis in evidence for any potential Section 2 violation, *see infra* section III.A, we need not decide here whether this interpretation of *Strickland* was proper.

It is clear that the name of the *Strickland* case operated as a shorthand for the Chairs' 50%-plus-one instruction whenever it was employed. In other words, throughout the redistricting process, "complying with *Strickland*" meant drawing all purported VRA districts at 50%-plus-one BVAP. The Chairs made that clear in their very first public statement, which accompanied the June 17 release of the House and Senate VRA maps. *See* Joint Ex. 1005 at 2 ("Under the *Strickland* decisions, districts created to comply with section 2 of the Voting Rights Act, must be created with a [BVAP] at the level of at least 50% plus one. Thus, in constructing VRA majority black districts, the Chairs recommend that, where possible, these districts be drawn at a level equal to at least 50% plus one 'BVAP.'").

The 50%-plus-one requirement, always tied to *Strickland*, was then repeated in every formal public statement issued by the Chairs, and in nearly every explanatory comment made to other legislators throughout the redistricting process. *See* Joint Ex. 1006 at 7 (Joint Statement by Redistricting Chairs Prior to June 23, 2011, Public Hearing) ("[VRA] districts must comply with *Strickland* . . . and [therefore] be drawn at a level that constitutes a true majority of black voting age population."); Joint Ex. 1007 at 4-5 (July 12, 2011, Joint Statement by Redistricting Chairs) ("[*Strickland*] require[s] that [VRA] districts . . . be drawn with a [BVAP] in excess of 50% plus one. . . . [I]n light of [*Strickland*], we see no principled legal reason not to draw all VRA districts at the 50% or above level when it is possible to do so."); Joint Ex. 1015 at 89 (July 25, 2011, Senate Floor Session) (Rucho) ("*Strickland* . . . said

that any district drawn to comply with or avoid liability under Section 2 of the Voting Rights Act must be drawn at . . . 50 percent or more of black voting age population."); Joint Ex. 1020 at 52 (July 25, 2011, House Floor Session) (Lewis) ("[O]ur proposed plan complies with Section 2 of the Voting Rights Act under the decision by the United States Supreme Court in *Strickland* . . . . The state is now obligated to draw majority black districts with true majority black voting age population."); *see also* Trial Tr. vol. III, 195:15-18 (Lewis) ("[W]e felt . . . that the *Strickland* requirement of majority-minority districts . . . meant that we should draw the VRA districts at over 50 percent . . . ."); *id.* at 195:25-196:2 ("It was my understanding of the *Strickland* decision that drawing the districts at 50 percent plus one was the threshold for creating a VRA district.").

It is clear, then, that the 50%-plus-one BVAP target was of paramount concern for the Chairs as they drew purported VRA districts, including the challenged districts.

b. VRA Districts First

Another main instruction the Chairs gave Dr. Hofeller regarding the purported VRA districts was to draw those districts first, before any other "non-VRA" districts were drawn or any other redistricting criteria (besides the 50%-plus-one requirement) were considered. Trial Tr. vol. III, 207:12-14 (Lewis) ("[Q:] And one instruction was to draw the VRA districts first? You told Dr. Hofeller to draw th[ose] districts first? [A:] Yes, sir."); Joint Ex. 1005 at 1 ("VRA districts [must] be created before other legislative districts."). In fact, as described above, the VRA

districts were not only drawn first, but also released first—nearly one month before the release of the full redistricting maps. Second Joint Stip. ¶¶ 8, 11; Defs.' Ex. 3013-1 at 2, 3.

The Chairs' instruction to draw VRA districts first was grounded in a pair of opinions issued by the Supreme Court of North Carolina. *See Stephenson I*, 562 S.E.2d 377; *Stephenson II*, 582 S.E.2d 247. As mentioned above, *see supra* section I.A, both *Stephenson I* and *Stephenson II* sought to harmonize the state constitution's WCP with federal election law, including the one person, one vote requirement and the VRA. Recognizing the supremacy of federal legal requirements, the *Stephenson* decisions set forth an enumerated, hierarchical list of steps to guide the enactment of "any constitutionally valid redistricting plan." *Stephenson II*, 582 S.E.2d at 250.

As explained in *Stephenson II*, step 1 of any North Carolina redistricting process is that "legislative districts required by the VRA shall be formed prior to creation of non-VRA districts," and that "to the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP." *Id.* Compliance with one person, one vote is step 2. *Id.* Later steps require the formation of single-district, one-county groups (step 3); the formation of multi-district, single-county groups (step 4); the formation of multi-county groupings, with a preference for fewer counties per

group (steps 5 and 6); and the consideration of communities of interest (step 7). *Id.*[11]

As discussed below, it is clear that as the map-drawing process unfolded, the Chairs and Dr. Hofeller did attempt to comply with the WCP as defined by the *Stephenson* cases. *See infra* section II.A.2. However, it is equally clear that, in accordance with those cases, the Chairs and Dr. Hofeller made drawing VRA districts—as they understood them—their *first* priority. *See* Trial Tr. vol. IV, 7:17-25 (Rucho) ("*Stephenson* required the General Assembly, as we were drawing these maps, to take on the Voting Rights Act issue *first* because of federal dominance over the state law. The *second* part was that we also needed to harmonize what is the [WCP]." (emphasis added)); *id.* at 48:22-49:4 ("[Q:] You say you complied with *Stephenson*; that was your goal? [A:] Yes, sir. We followed the *Stephenson* decision to its letter. [Q:] And under that analysis, what was the first thing that you believed you had to do? [A:] Well, the *first* step, as required, would have been for us to identify potential[] VRA districts." (emphasis added)); Trial Tr. vol. IV, 219:2-9 (Hofeller) ("The *Stephenson* case instructed, according to my understanding of it, that the *first* thing that had to happen was an analysis of the areas of concentrations of minority voters in the state

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[11] The final two requirements are that multi-member districts be avoided unless "necessary to advance a compelling governmental interest" and, generally, that any departures from "the legal requirements set forth herein" occur "only to the extent necessary to comply with federal law." *Stephenson II*, 582 S.E.2d at 250-51.

to determine where VRA districts could be drawn and then to proceed to draw districts." (emphasis added)); Joint Ex. 1024 at 22 (House 2011 Section 5 Submission) ("[The *Stephenson* cases hold] that districts 'required by the Voting Rights Act' must be created before any other districts."); Joint Ex. 1023 at 20 (Senate 2011 Section 5 Submission) (same).

Further, because the Chairs and Dr. Hofeller believed that *Strickland* required all VRA districts to be drawn at 50%-plus-one BVAP, they applied that purported requirement at *Stephenson*'s first step. In other words, complying with *Stephenson* to the Chairs meant drawing 50%-plus-one districts, and drawing them *first*. *See* Trial Tr. vol. IV, 46:20-47:1 (Rucho) ("[Q:] And is it your understanding that *Strickland* is encompassed in the way that you understand the *Stephenson* case? [A:] Yes, sir. The *Stephenson* case . . . included the decision on *Strickland* requiring the 50 percent plus one, as far as saying that if you are building a VRA district, then you can go ahead and follow that as part of the law."); *id.* at 32:25-33:3 ("[Q:] [Y]ou applied the 50 percent plus one rule across the state, didn't you? [A:] That was what was expected of us as we followed the *Stephenson* criteria.").

The Chairs' combined understanding of the *Strickland* and *Stephenson* cases thus operated to make the 50%-plus-one BVAP threshold Dr. Hofeller's first consideration—both in time and

priority—in drawing all VRA districts and therefore all challenged districts.[12]

c. Near-Maximization of VRA Districts

Finally, in addition to instructing Dr. Hofeller to draw all purported VRA districts first and to draw them at 50%-plus-one BVAP, the Chairs instructed him to draw enough VRA districts "to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their preferred candidates of choice." Joint Ex. 1005 at 3. According to the Chairs, this would mean "the creation of 24 majority African American House districts and 10 majority African American Senate districts." *Id.* Like the invocation of *Strickland* and *Stephenson*, this proportionality criterion was stressed in each of the Chairs' public statements, and it was repeated throughout the redistricting process. *Id.*; Joint Ex. 1006 at 7 (explaining that any proposed maps must "provide black voters with a substantially proportional state-wide opportunity to elect candidates of their choice"); Joint Ex. 1007 at 5 ("Our proposed plan provides black voters in North Carolina with substantial or rough proportionality in the number of VRA districts in which they have an equal opportunity to elect their preferred candidates of choice."); *see also* Joint Ex. 1018 at 12-14 (July 21, 2011, House Redistricting Committee Meeting); Joint

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[12] We express no view as to whether the *Stephenson* cases require that VRA districts be drawn first both in priority *and* in time. As the record shows, and as is sufficient for our analysis, the Chairs interpreted those cases to require that VRA districts be drawn before all other districts.

Ex. 1021 at 21 (July 27, 2011, Senate Redistricting Committee Meeting).

As with their 50%-plus-one BVAP target, the Chairs sought to ground their proportionality goal in case law. Citing *Johnson v. De Grandy*, 512 U.S. 997 (1994), they asserted that achieving proportionality would "further[] the State's obligation to comply with Section 2 of the Voting Rights Act," Joint Ex. 1005 at 4, in that it would "give the State an important defense to any lawsuit that might be filed challenging the plans under Section 2," Joint Ex. 1007 at 5. Representative Lewis stated his belief that proportionality would likely "insulate [the state] from lawsuits," Trial Tr. vol. III, 196:7-11, and Senator Rucho indicated at least once his understanding that proportionality was "required," Joint Ex. 1021 at 21.

This was not a proper interpretation of the law. *De Grandy* considered rough proportionality—i.e., whether "minority voters form[ed] effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population"—as *one* "relevant fact in the totality of circumstances" bearing on a Section 2 vote dilution claim. 512 U.S. at 1000. That same case also clarified that under no circumstances is proportionality to be considered a "safe harbor" from Section 2 litigation, *id.* at 1017-21, and that proportionality should not be sought if it requires destroying "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice," *id.* at 1020. In other

words, proportionality is not required, not a safe harbor, and not to be pursued at the cost of fracturing effective coalitional districts.[13]

Though grounded in legal misconceptions, the proportionality goal was nevertheless applied to effect a major increase in the number of majority-black districts across the state. The Benchmark House Plan as drawn had only nine majority-black districts, Defs.' Ex. 3001 at 315-17, meaning that the Chairs' proportionality goal would require creating fifteen new majority-black districts to reach their twenty-four-district target. The Benchmark Senate Plan as drawn had no majority-black districts, Defs.' Ex. 3000 at 151, meaning that the Chairs' proportionality goal would require creating ten new majority-black districts to reach their ten-district

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[13] The Chairs also came close to conflating rough proportionality, a permissible redistricting consideration, with "proportional *representation*," which Section 2 expressly excludes from the scope of its protections. *See* 52 U.S.C. § 10301(b). While proportionality "links the number of majority-minority voting *districts* to minority members' share of the relevant population," proportional representation relates the number of elected *representatives* who are members of a particular minority group to that minority's population. *De Grandy*, 512 U.S. at 1014 n.11 (emphasis added). The Chairs suggested a concern with proportional representation, for instance, when they cited the number of African-American candidates who had actually been *elected* to the General Assembly in justifying their proportionality goal. *See* Joint Ex. 1005 at 3. Similarly, later in the redistricting process, the Chairs spoke of providing a certain number of "seats" for African-American representatives. Joint Ex. 1018 at 12 (Lewis); Joint Ex. 1021 at 21 (Rucho).

target.[14] Overall, the Chairs sought to more than triple the number of majority-black General Assembly districts, from nine to thirty-four.

The Enacted Plans fell just short of the stated goal.[15] In the House, while the VRA map released on June 17 had included twenty-four majority-black districts, Joint Ex. 1005 at 3, the Chairs "elected to delete a majority black district [they] had proposed for southeastern North Carolina based upon . . . strong statements opposing such a district,"

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[14] We recognize that comparisons to benchmark plans and districts may be of limited value because such plans are based on outdated census information, and so could not have been reenacted without modification to comply with one person, one vote requirements. However, comparisons to benchmarks may still yield useful insights, particularly where there are marked differences between past and present plans. *See Alabama*, 135 S. Ct. at 1271 (examining "individuals that the new redistricting laws added to the population of" a benchmark district as relevant to the predominance inquiry).

[15] Even though the Chairs fell one majority-black district short in each chamber of the targets they set forth in their June 17 statement, they nevertheless insisted that they had succeeded in achieving their proportionality goal. Joint Ex. 1007 at 2 ("[The twenty-three majority-black districts,] combined with two over 40% BVAP districts, continue to provide black voters with a substantially proportional and equal opportunity to elect candidates of their choice."); Joint Ex. 1005 at 6 ("If adopted by the General Assembly, proposed [Senate] District 32 will provide African American citizens with a more equal, and tenth opportunity, to elect a candidate of choice."); Joint Ex. 1007 at 3-5 (explaining that Senate District 32, drawn with a BVAP of 42.53%, counted as one of the ten Senate VRA districts). This is a conclusion difficult to square with the Chairs' repeated assertions that only 50%-plus-one BVAP districts could satisfy the VRA.

Joint Ex. 1007 at 2. The Chairs also noted that, due to "the lack of black population," they could not draw "two majority BVAP [House] districts . . . in Forsyth County." Joint Ex. 1007 at 5.

As for the Senate, the Chairs explained that they had "been unable to identify a reasonably compact majority African American population to create a tenth majority African American [Senate] district." Joint Ex. 1005 at 4; *see also* Joint Ex. 1006 at 2; Joint Ex. 1007 at 4 ("[O]ur tenth [majority-black] senate district, District 32, cannot be drawn within Forsyth County in excess of 50% plus one.").

Either way, the end result of the proportionality goal was a striking increase in the number of majority-black General Assembly districts. The Enacted House Plan contains twenty-three majority-black districts, and the Enacted Senate Plan contains nine, meaning that the total number of majority-black General Assembly districts increased from nine to thirty-two. Joint Ex. 1023 at 10; Joint Ex. 1024 at 10.

The fact that the goal sought to increase, significantly, the number of majority-black General Assembly districts suggests that here the proportionality target functionally operated as a goal to maximize the number of majority-black districts. In response to a question regarding the proportionality instruction, Senator Rucho responded that his instruction was for Dr. Hofeller to draw VRA districts "wherever he could . . . but with no requirement of maximization." Trial Tr. vol. IV, 36:4-5. It is difficult to see, though, how the instruction to draw VRA districts "wherever" one can or "where

possible," Trial Tr. vol. V, 81:17-20 (Hofeller); Joint Ex. 1005 at 2-3, is meaningfully different from a goal to maximize such districts.

Even if the proportionality goal was not quite a maximization policy, there is no doubt that this statewide numerical target was based on race, and that it was of principal importance during the 2011 redistricting process. Because the proportionality goal was considered to be a component of VRA compliance, that priority—along with the 50%-plus-one requirement—was folded into the first *Stephenson* step, and thereby the first step of the redistricting. *See* Trial Tr. vol. IV, 36:6-10 (Rucho) ("[Q:] And the [Senate] plan that was enacted included ten districts that you believed met the State's obligations under the Voting Rights Act; correct? [A:] In our understanding of what was expected of us following the *Stephenson* decision and the criteria, yes.").

That meant that two numerical racial targets—the 50%-plus-one goal and the proportionality goal—took precedence in the redistricting process.

d. Three "Primary" Criteria

It is not just that the 50%-plus-one instruction, the proportionality goal, and compliance with *Stephenson* (including its requirement to draw VRA districts first) were the criteria most frequently or prominently cited by the Chairs. Those three considerations were also often identified by the Chairs themselves and by Dr. Hofeller as the only "primary" criteria.

For example, in his affidavit, Dr. Hofeller identified *Strickland* (i.e., the 50%-plus-one

requirement), *Stephenson* (including the instruction to draw VRA districts first), and the proportionality goal as the three "primary criteria used to draw [the redistricting] plans." Defs.' Ex. 3026 at 4. And when the Chairs first proposed a complete plan, they announced in their accompanying public statement that their "primary goal [was] to propose maps that will survive any possible legal challenge," and then identified *Stephenson*, *Strickland* (meaning the 50%-plus-one requirement), and compliance with the VRA (meaning proportionality, in addition to the 50%-plus-one requirement) as the "legal requirement[s]" that would ward off such litigation. Joint Ex. 1007 at 1-2.

The Chairs also indicated these were the criteria that "could not be compromised." *Shaw II*, 517 U.S. at 907. For instance, after announcing their proposed VRA districts, the Chairs stated that any alternative proposals should comply with three criteria: the *Stephenson* cases, *Strickland*, and the proportionality goal. Joint Ex. 1005 at 8. Six days later, the Chairs again stressed in a public statement that they would "entertain any specific suggestions" for alternative districts, but only if those suggested alternatives satisfied the proportionality and 50%-plus-one targets. Joint Ex. 1006 at 7. Even before proposing any plans, they asked the Legislative Black Caucus to "take into consideration the requirements of *Strickland* . . . as well as the *Stephenson* line of cases" in suggesting possible districts. Defs.' Ex. 3013-5 at 2 (Apr. 5, 2011, Email and Letter from Redistricting Chairs to Leaders of the Legislative Black Caucus).

By their own characterization, then, the 50%-plus-one target and the proportionality goal were two of the three "primary" criteria the Chairs and Dr. Hofeller employed. And the third—compliance with the *Stephenson* cases—assured that those two "mechanical racial targets," which the Chairs took to be necessary for compliance with the VRA, would be "prioritiz[ed] . . . above all other districting criteria (save one-person, one-vote)." *Alabama*, 135 S. Ct. at 1267.[16]

In other words, the overriding priority of the redistricting plan was to draw a predetermined race-based number of districts, each defined by race.

2. Dr. Hofeller's Implementation of the Chairs' Instructions

Given clear instructions, Dr. Hofeller closely followed them.

One of Dr. Hofeller's first tasks, conducted in March 2011 soon after receipt of the 2010 census data, was the creation of a spreadsheet calculating the exact number of majority-black districts in the House and Senate that would achieve the Chairs' proportionality goal. Pls.' Ex. 2037 (Carolina

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[16] It should be noted that the Chairs also referenced and sought to comply with the one person, one vote requirement, which was incorporated by the *Stephenson* cases. *See, e.g.*, Joint Ex. 1005 at 5; Joint Ex. 1007 at 1-2. That does not affect our predominance analysis, however. *See Alabama*, 135 S. Ct. at 1270 ("[A]n equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate . . . .").

Proportionality Chart); Second Joint Stip. ¶ 4; Trial Tr. vol. V, 89:17-91:16 (Hofeller).

Next, for both the House and Senate, Dr. Hofeller conducted "a demographic analysis . . . to determine where in the State sufficiently populous, compact minority populations were present to form single-member African-American . . . districts containing minority population percentages in excess of 50%."[17] Defs.' Ex. 3030 at 5 (Second Expert Report of Thomas B. Hofeller, Ph.D.). Based on this analysis, he drew VRA "exemplar districts," which were "racially defined" in that they embodied nothing more than "concentrations of minority voters" capable of constituting a district that could satisfy the 50%-plus-one BVAP threshold. Trial Tr. vol. IV, 228:5-12 (Hofeller); Trial Tr. vol. V, 104:4-105:1 (Hofeller). Dr. Hofeller drew the VRA exemplar districts without reference to any communities of interest or geographic subdivisions, such as county lines and precinct lines. Trial Tr. vol. V, 104:21-105:6 (Hofeller).[18]

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[17] That "demographic analysis" also accounted for one area of the state with a high concentration of Native American voters, which was included as House District 47 in the proposed House VRA map and Enacted House Plan. Defs.' Ex. 3030 at 5; Joint Ex. 1005 at 6; Joint Ex. 1004 at 1 (Enacted House Plan Map).

[18] In this opinion, we use the term "precincts" to refer to "voter tabulation districts" (VTDs). Counties in North Carolina draw precinct lines based on the latest census. Joint Ex. 1012 at 19. The General Assembly created VTDs on January 1, 2008, defined by the precinct lines as they existed on that date. N.C. Gen. Stat. § 163-132.1B. For the most part, precincts and VTDs in North Carolina remain the same, although since January 1, 2008, some counties have divided certain VTDs into

After drawing exemplar 50%-plus-one BVAP districts across the state, Dr. Hofeller then drew a separate "optimum [county] grouping map" in accordance with the criteria outlined by the *Stephenson* cases. Trial Tr. vol. IV, 240:8-11 (Hofeller). Because the boundary lines of the optimum county grouping map often crossed the lines of the VRA exemplar districts, Dr. Hofeller then engaged in what he termed "an iterative harmonization project" in order to create county groups that could accommodate 50%-plus-one VRA districts, and vice versa. *Id.* at 240:11-241:1; *see also id.* at 237:10-14; Trial Tr. vol. V, 28:9-12 (Hofeller) ("[T]he optimal county groups . . . , because of the Voting Rights Act provision in *Stephenson*, had to be modified in order to create the districts that we felt needed to be created.").

Ultimately, the optimum county groups were substantially modified, such that in many of those areas of the state where purported VRA districts were drawn, the optimum county groups were *not* enacted. *See* Defs.' Ex. 3030 at 100-01 (Maps 9 and 10) (optimum groups excluded from Enacted Plans in

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multiple precincts. Only twenty-three VTDs that were further divided into precincts were split by the Enacted House Plan, and only sixteen VTDs that were further divided into precincts were split by the Enacted Senate Plan. Pls.' Ex. 2092 at 3 (Second Aff. of Theodore Arrington, Ph.D. in *N.C. State Conference of Branches of the NAACP v. North Carolina*, No. 11-CV-01640 (N.C. Super. Ct.)). Significantly, the Enacted Plans did not split any of these further-divided VTDs along the newly formed precinct lines. *Id.* In other words, for our purposes, "VTD" and "precinct" are essentially synonymous.

white); Trial Tr. vol. IV, 236:10-25 (Hofeller); Trial Tr. vol. V, 28:7-17 (Hofeller).

In contrast, "[a]ll of the 2011 enacted VRA districts for the General Assembly are substantially based on the compact minority populations found in the corresponding exemplar districts." Defs.' Ex. 3029 at 9 (First Decl. of Thomas B. Hofeller, Ph.D.). Indeed, the vast majority of the African-American population included in Dr. Hofeller's VRA exemplar districts was eventually included in enacted VRA districts. Trial Tr. vol. IV, 238:18-21 (Hofeller) ("[T]he plans created and enacted have to contain a very high percentage of those minority areas from one or more of those [exemplar] districts in the district which is enacted."). On average, 90.25% of the total BVAP in the House VRA exemplar districts and 83.64% of the total BVAP in the Senate VRA exemplar districts were incorporated into an enacted VRA district. Defs.' Ex. 3029 at 28.

Most significantly, although the boundaries of some VRA exemplar districts did shift as Dr. Hofeller sought to "harmonize" them with the county groupings, the Chairs' 50%-plus-one BVAP target was not compromised.[19] Indeed, Dr. Hofeller did whatever it took to meet that racial threshold, even where doing so required major sacrifices in terms of respect for other traditional districting principles. Trial Tr. vol. V, 20:12-19 (Hofeller) ("[A]s you tried to

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[19] There was one exception among the challenged districts: Senate District 32 was enacted with a BVAP of 42.53%. Third Joint Stip. ¶ 107, ECF No. 90. We therefore consider it separately and independently in our predominance analysis. *See infra* section II.B.7.

lift the black voting-age population in the districts up above 50 percent, it became increasingly difficult to include territory in those districts which had the requisite number of African-American adults in them percentage-wise. So as you were reaching out to do that, it became more and more difficult, and that, in turn, governed the shapes of those districts."); *id.* at 32:17-21 ("[A]s you attempt[ed] to raise the minority percentage in some of these districts . . . it became increasingly difficult to find areas that had high percentages of African-Americans to raise that district up."); *see also id.* at 105:7-14; Trial Tr. vol. IV, 231:2-4 (Hofeller).

As Dr. Hofeller strived to keep VRA districts at 50%-plus-one BVAP throughout the "harmonization" process, the boundaries of those districts generally became less compact. Although some lines in multi-county groupings did follow county boundaries, that often had the effect of making any remaining, non-county lines more irregular so that the 50%-plus-one BVAP threshold could be attained. *See* Trial Tr. vol. IV, 237:10-14 (Hofeller) (explaining that the exemplar version of House District 12 was more compact prior to harmonization with the optimum county groupings); *id.* at 238:5-8 (explaining that "the compact version" of House District 48, i.e., the exemplar district, crossed into multiple county groups).

In short, Dr. Hofeller drew race-defined exemplar districts across the state in order to implement the 50%-plus-one BVAP and proportionality goals for the purported VRA districts. Those exemplar districts, while modified somewhat

in their boundaries to accommodate the *Stephenson* criteria, were nevertheless substantially enacted as drawn to achieve the uncompromising 50%-plus-one target. Trial Tr. vol. IV, 231:2-4 (Hofeller) ("[T]hose [exemplar] areas quickly morph[ed] into actual districts, which would be the proposed districts in the state . . . .").

3. The Subordination of Race-Neutral Districting Criteria

As might now be clear, because race-based goals were primary in the 2011 redistricting process, other "traditional race-neutral districting principles, including . . . compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests," *Miller*, 515 U.S. at 916, were secondary, tertiary, or even neglected entirely in the Chairs' instructions to Dr. Hofeller, and in his implementation of those instructions.

a. Political Subdivisions and Communities of Interest

The Supreme Court has indicated that one "traditional districting principle[]" whose disregard may indicate racial predominance includes "respect for political subdivisions." *Shaw I*, 509 U.S. at 647. For example, the division of counties, municipalities, and precincts may be evidence of racial predominance. *Miller*, 515 U.S. at 908, 918. Additionally, if the legislature has split "communities of interest" and instead grouped areas with "fractured political, social, and economic interests," connected solely by race, that too may indicate that race was the predominant factor in redistricting. *Id.* at 919.

The Chairs did not give Dr. Hofeller any instructions to keep towns or cities whole, to preserve communities of interest, or to avoid splitting precincts. Trial Tr. vol. III, 202:1-203:22 (Lewis). Consequently, aside from seeking to create county groupings that were compliant with *Stephenson* (and even then only after satisfying the 50%-plus-one goal), Dr. Hofeller paid little attention to political subdivisions or communities of interest as he drew his lines, and he divided precincts as necessary in order to satisfy the 50%-plus-one target. Trial Tr. vol. V, 104:21-105:6 (Hofeller); Trial Tr. vol. IV, 43:16-20 (Rucho) ("[Q:] You and Dr. Hofeller divided precincts as necessary to get to your 50 percent goal; correct? . . . [A:] Yes . . . it was essential for us to be able to do whatever—to use whatever tools were necessary for Dr. Hofeller to harmonize the criteria."); *id.* at 44:6-8 ("[Q:] Following the law required you to divide precincts; is that your testimony? . . . [A:] Following the law—yes, it did.").

As a result, it is not surprising that the Enacted House and Senate Plans split a high number of precincts. Of the 2,692 precincts in North Carolina, the Enacted House Plan splits 395 precincts, where the Benchmark House Plan split only 285. Pls.' Ex. 2091 at 3 (First Aff. of Theodore S. Arrington, Ph.D. in *N.C. State Conference of Branches of the NAACP v. North Carolina*, No. 11-CV-01640 (N.C. Super. Ct.)); Defs.' Ex. 3017-7 at 2 (Aff. of Dan Frey in *Dickson v. Rucho*, Ex. 7). The contrast is even starker in the Senate. While the Enacted Senate Plan splits 257 precincts, the Benchmark Senate Plan split only 79. Pls.' Ex. 2091 at 3; Defs.' Ex. 3017-7 at 2.

Aside from the large overall number of precinct splits, there is statistically significant evidence that precincts were generally divided for the purpose of separating voters according to race. As an initial matter, it should be noted that racial data—but not, for example, political data—is available below the precinct level, and is reported for every census block. Pls.' Ex. 2091 at 3-4; Trial Tr. vol. I, 113:19-114:14, 161:9-11 (Arrington). Not surprisingly, then, when precincts were split in both the House and Senate Enacted Plans, the portions that were more heavily African-American in population were systematically assigned to predominantly black districts, and the predominantly white portions to white districts. Pls.' Ex. 2091 at 7-10, 14, 18-19; Trial Tr. vol. I, 117:10-121:16 (Arrington). Precincts were "almost never" split between two white districts. Trial Tr. vol. I, 121:23 (Arrington). And precinct splitting occurred most often in the most racially diverse areas of the state, i.e., those areas with both substantial white and substantial black populations. *Id.* at 122:20-124:11; Pls.' Ex. 2092 at 10-11, 22, 24-25 (Second Aff. of Theodore S. Arrington, Ph.D. in *N.C. State Conference of Branches of the NAACP v. North Carolina*, No. 11-CV-01640 (N.C. Super. Ct.)).

Generally, it appears that little to no attention was paid to political subdivisions, communities of interest, or precinct boundaries when drawing the challenged districts' lines. All such criteria were "subordinated . . . to racial considerations." *Miller*, 515 U.S. at 916.

b. Compactness

The Supreme Court has also identified "compactness" as among those "traditional districting principles" whose disregard may indicate the predominance of race in redistricting. *Shaw I*, 509 U.S. at 647. The regularity and compactness of a district "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913; *see also League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 433 (2006) ("In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines."); *Shaw II*, 517 U.S. at 905-06 (considering a district's bizarre shape and non-compactness to affirm a finding of racial predominance).

As with other traditional redistricting principles, Dr. Hofeller was not instructed to make compactness a "primary" or even "secondary" redistricting criterion. Trial Tr. vol. V, 97:16-18 (Hofeller). In Dr. Hofeller's words, "[c]ompactness would not . . . 'trump' the need to create 50 percent districts." *Id.* at 97:14-15. In fact, although the map-drawing software program Dr. Hofeller used could calculate eight compactness measures, Dr. Hofeller never ran those numbers at any time prior to the Plans' enactment.[20] *Id.* at 99:8-21.

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[20] Plaintiffs' expert Anthony Fairfax testified that the eight measures available in the map-drawing software program are known as Reock, Ehrenburg, Polsby-Popper, Schwartzberg,

The results show. The Enacted House Plan is less compact than the Benchmark Plan according to all eight of the measures calculated by Dr. Hofeller's map-drawing program, Maptitude. Pls.' Ex. 2094 at 10 (Second Aff. of Anthony E. Fairfax in *Dickson v. Rucho*). The Enacted Senate Plan is less compact than the Benchmark Plan on seven of those eight measures. *Id.* at 9.

Of course, statewide compactness scores cannot establish whether race predominated in drawing a particular district, and numerical compactness scores have limited value in determining racial predominance. *See generally* section II.B. But the fact that these particular compactness scores were available to Dr. Hofeller as he drew district lines and yet were apparently given little consideration does suggest that compactness was subordinated to the Chairs' racial goals throughout the redistricting.

c. The WCP

As an initial matter, the WCP cannot be relied upon as having determined the shape of district lines drawn within a single county. *See* Defs.' Ex. 3028 at 11 (Third Aff. of Thomas B. Hofeller, Ph.D. in *Dickson v. Rucho*) ("The 16 minority districts drawn within single counties did not require reconfigurations of the county groups.").

Perimeter, Length-Width, Population Circle, and Population Polygon. Trial Tr. vol. I, 168:24-173:12. Using data from the General Assembly and the same software utilized by Dr. Hofeller, Mr. Fairfax generated scores on all eight measures for the Enacted House and Senate Plans, as well as the Benchmark House and Senate Plans. Pls.' Ex. 2094 at 2-3.

However, as we have seen, in seeking to comply with the WCP as articulated in the *Stephenson* cases, the Chairs and Dr. Hofeller did pay substantial attention to county groupings. Those groupings, in turn, certainly influenced the overall shape and location of some of the challenged districts. But there is no doubt that WCP compliance was nevertheless subordinated to the 50%-plus-one and proportionality targets.

First, in applying the *Stephenson* criteria, the Chairs directed that all purported VRA districts be drawn first, before any other districts. *See* section II.A.1.b. Because the Chairs' 50%-plus-one and proportionality goals applied to VRA districts, those targets necessarily predominated over the remaining *Stephenson* criteria, including the requirement to minimize the size of county groupings. In addition, Dr. Hofeller testified that such subordinate *Stephenson* rules as the county traversal rule—under which the crossing of county lines is minimized within a county group—could only be broken if doing so facilitated the creation of districts required by the VRA, which under the Chairs' definition meant districts greater than 50% BVAP. *See* Trial Tr. vol. V, 11:8-23.

Second, as discussed above, where there was conflict between the optimum county groupings and the VRA exemplar districts, Dr. Hofeller generally resolved that conflict in favor of the latter. The optimum county groupings were often excluded from the Enacted Plans in challenged areas of the state, and the vast majority of the BVAP encompassed in

VRA exemplar districts was included in enacted VRA districts. *See supra* section II.A.2.

Finally, and perhaps most importantly, even where county groupings or county lines played some role in the eventual shape of the enacted district, what was never compromised was the 50%-plus-one BVAP target.

In other words, the concern with WCP compliance "came into play only after the race-based decision[s] had been made." *Shaw II*, 517 U.S. at 907. Consequently, that the WCP influenced the redistricting efforts "does not in any way refute . . . that race was the . . . predominant consideration." *Id.*

d. Politics

Finally, there is no evidence in this record that political considerations played a primary role in the drawing of the challenged districts. Indeed, the evidence suggests the opposite. In one of their first public statements, the Chairs made a point of responding to the claim that "[t]he proposed VRA districts plan is solely an attempt to maintain Republicans' political power," which they characterized as an "erroneous statement[]." Joint Ex. 1006 at 1, 3. The Chairs' response to the claim was that "[t]he State has an obligation to comply with the [VRA]," and that any increased competitiveness for Republicans merely "result[ed] from [that] compliance." *Id.* at 3-4. Senator Rucho said the same thing the next month during a Senate Redistricting Committee Meeting. Joint Ex. 1013 at 36 ("I mean, very simply, we're following . . . the letter of the law. And if it makes the rest of the

districts more competitive, then very simply, you know, is that wrong that they're more competitive? I don't think so."). Although there was an increase in the maps' political favorability for North Carolina Republicans, *see* Defs.' Ex. 3031 (Revised Aff. of Sean P. Trende in *Dickson v. Rucho*), these statements suggest that such an increase was attributable to VRA compliance.

In other words, according to the Chairs' statements, politics was an afterthought. And aside from a few scattered references in the record to the "political" nature of redistricting, *see* Trial Tr. vol. III, 123:23-124:5 (Lewis), or the fact that "[p]olitics has traditionally played a role in redistricting," Defs.' Ex. 3069 at 15 (2011 Legislator's Guide to North Carolina Legislative and Congressional Redistricting), there is nothing in the record in connection with the districts at issue here to suggest that statewide political considerations motivated the 2011 redistricting process.[21]

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[21] That easily distinguishes this case from the *Cromartie* cases, where there was substantial direct evidence supporting the State's "legitimate political explanation for its districting decision." *Cromartie II*, 532 U.S. at 242; *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541, 549 (1999) (detailing evidence, including affidavit testimony from the two legislators responsible for the relevant redistricting plan to the effect that their aims were "to protect incumbents, to adhere to traditional districting criteria, and to preserve the existing partisan balance in the State's congressional delegation"). The Court in *Cromartie II* also stressed that the direct evidence of racial predominance was weak. *See* 532 U.S. at 254 (finding evidence "less persuasive than the kinds of direct evidence . . . found significant in other redistricting cases." including concessions by the state that its goal was the creation of majority-minority

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In sum, there is copious statewide evidence that race-based criteria predominated—and that race-neutral criteria were subordinated—in the creation of the Chairs' 50%-plus-one purported VRA districts.

B. Analysis of District-Specific Evidence of Racial Predominance

As a racial gerrymandering claim "applies district-by-district," and not to the state "as an undifferentiated 'whole,'" we must also consider district-specific evidence signifying that race predominated in drawing the challenged districts. *Alabama*, 135 S. Ct. at 1265. For all the challenged districts, the overwhelming statewide evidence provides decisive proof that race predominated. *See id.* ("Voters, of course, can present statewide evidence in order to prove racial gerrymandering in a particular district."). But a look to the district-specific evidence in this case supports and confirms that conclusion, and provides concrete illustrative examples of how compactness, traditional political and geographic boundaries, communities of interest, and the WCP were compromised in order to meet the 50%-plus-one target and proportionality goal.

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districts). Given these considerable distinctions between the cases, we see no basis for requiring Plaintiffs to present us with alternative plans showing that the "legislature could have achieved its legitimate political objectives in alternative ways." *Id.* at 258; *see Harris*, 2016 WL 482052, at *17; *Page*, 2015 WL 3604029, at *7 n.12. Indeed, Defendants have not identified with any specificity which "legitimate political objectives" any alternative plans ought to have "achieved."

Before we delve into the district-specific evidence, certain key concepts and categories of evidence warrant further explanation.

First, in certain cases the Supreme Court has emphasized districts' compactness, *see Shaw II*, 517 U.S. at 905-06; *Miller*, 515 U.S. at 913, but it is important to note that a district's degree of compactness is usually not dispositive in a racial gerrymandering claim. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw I*, 509 U.S. at 646-47 (alteration in original) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). However, it is not the case that "a district must be bizarre on its face before there is a constitutional violation." *Miller*, 515 U.S. at 912. Compactness is simply one factor that can indicate whether race played a predominant role in drawing a district, and here our discussions of compactness merely serve to reinforce our conclusions regarding racial predominance.

There are two primary ways that courts evaluate compactness. One way is through quantitative measures of compactness, like the eight measures available in Dr. Hofeller's map-drawing software and entered into evidence as part of Mr. Fairfax's expert report. *See* Pls.' Ex. 2094 at 2. "Substantial divergences from a mathematical standard of compactness may be symptoms of illegitimate gerrymandering." *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring). However, the

Supreme Court has not established clear numerical standards defining when a district becomes non-compact. *See Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 535 (E.D. Va. 2015) (discussing the challenges of utilizing compactness scores when "no one can agree what [compactness] is or, as a result, how to measure it"), *prob. juris. noted*, 136 S. Ct. 2406 (2016). And there is no clear consensus among scholars defining the exact score on a particular measure that divides compact from non-compact districts. Trial Tr. vol. I, 183:7-13 (Fairfax). Instead, compactness scores are most useful to show *relative* compactness, by comparing one district to alternative or benchmark versions of that district, or comparing scores to the statewide or nationwide average. *See Vera*, 517 U.S. at 960 (citing a study measuring the relative compactness of districts nationwide).

The other way to measure compactness is "by an 'eyeball' approach," *Vera*, 517 U.S. at 960, or what has been called the "interocular test," Trial Tr. vol. I, 157:18-158:7 (Arrington). Although visually assessing districts necessarily involves some subjective judgment, the Supreme Court has repeatedly relied upon such assessments to determine if a district is "bizarre" or "irregular." *See, e.g.*, *Vera*, 517 U.S. at 965-66; *Shaw II*, 517 U.S. at 905-06; *Shaw I*, 509 U.S. at 646-47.

Besides compactness, another districting concept in need of further explanation is "contiguity." The Supreme Court has identified contiguity as one of the "traditional race-neutral districting principles," *Miller*, 515 U.S. at 916, and the North Carolina

Constitution requires that each of the state's "district[s] shall at all times consist of contiguous territory," N.C. Const. art. II, §§ 3(2), 5(2). In *Stephenson II*, the Supreme Court of North Carolina affirmed a lower court's finding that "a district whose parts are 'held together' by the mathematical concept of 'point contiguity' does not meet the . . . criteria for contiguity." 582 S.E.2d at 254. The U.S. Supreme Court has likewise noted point contiguity as a sign that traditional districting criteria were compromised. *See Shaw I*, 509 U.S. at 636 ("At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them."). Additionally, districts may be contiguous, but only because they are connected by narrow "land bridges," which connect the more populous parts of the district (or in the case of a racial gerrymandering claim, the parts with higher concentrations of minority voters) with a narrow, sparsely populated strip. *Miller*, 515 U.S. at 908, 917. This, too, can be a sign of race predominating.

Finally, racial demographic data may help explain the location and idiosyncrasies of a district boundary. *Id.* at 917 (noting that even if a district is not "bizarre on its face," the predominance of race may become clearer "when its shape is considered in conjunction with its racial and population densities"); *see also Vera*, 517 U.S. at 961-62. Thus, in this case we may look to "racial density maps," which are shaded to indicate the percentage of the population in each census block that identified as any-part black. Because Dr. Hofeller testified that he used data of this nature while drawing the challenged

districts, the racial density maps can provide useful insights into whether district boundaries reflect racial differences in the population. Trial Tr. vol. V, 100:14-101:18; *see* Pls.' Ex. 2062 (providing a screenshot of racial density data projected onto a map in the map-drawing software used by Dr. Hofeller).[22]

Racial demographic data can also be useful because it may signify whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. Thus, the Supreme Court has considered the race of the individuals who were added to or subtracted from the benchmark district in order to form the enacted district. *See Alabama*, 135 S. Ct. at 1263, 1271. We also may consider testimony providing an explanation for the "contours" of the district. *LULAC*, 548 U.S. at 433.

Keeping these principles in mind, we turn to our district-specific analysis. Based on the following

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[22] We acknowledge that the racial density maps are limited in their value because they do not indicate the total number of African-American or white voters in a particular census block. *See* Trial Tr. vol. V, 59:9-60:17 (Hofeller). Particularly in rural locations, the census blocks may be shaded very dark (indicating a high proportion of BVAP) when only a few individuals live in that block, or may be completely white when there are no inhabitants in the census block at all. *Id.* Despite this shortcoming, these maps provide useful information regarding the racial make-up of each district. *See Vera*, 517 U.S. at 961-62 (finding that the state used "racial data at the block-by-block level" to "make more intricate refinements on the basis of race than on the basis of other demographic information").

evidence regarding each district, and our analysis of the statewide evidence above, we find that race was the predominant criterion in drawing all of the challenged districts.

1. Senate District 4

The enacted version of Senate District 4 is a majority-black district in northeastern North Carolina. The benchmark version of Senate District 4 had a BVAP of 49.14% under the 2000 census, which grew to a BVAP of 49.70% under the 2010 census. Defs.' Ex. 3000 at 151, 158. Enacted Senate District 4 was drawn with a BVAP of 52.75%, thus achieving the Chairs' goal of drawing each VRA district above 50% BVAP. Third Joint Stip. ¶ 3, ECF No. 90; Joint Ex. 1003 at 120 (Enacted Senate Plan map and statistical information). Senate District 4 was one of the VRA districts originally identified in the June 17 Senate VRA map and was enacted without substantial changes to the shape, location, or BVAP level of the proposed VRA district. Joint Ex. 1001 at 1, 67 (Senate VRA Map and statistical information); Joint Ex. 1003 at 1, 120; Pls.' Ex. 2072 at 1.

Enacted Senate District 4 encompasses the entirety of Vance, Warren, and Halifax Counties, then snakes through portions of Nash County and Wilson County, ending just south of the city of Wilson, North Carolina. Not only is enacted Senate District 4 less visually compact than the benchmark version, which was made entirely of whole counties, Pls.' Ex. 2012 at 1, but it is also quantitatively less compact than the benchmark district on six of the eight measures analyzed by Mr. Fairfax, Pls.' Ex. 2094 at 18, 20.

Enacted Senate District 4 divides two counties, five municipalities,[23] and two precincts. Third Joint Stip. ¶ 5; Joint Ex. 1003 at 6-8, 104. The demographic evidence suggests that these political and geographic units were divided on the basis of race. For instance, the portion of Nash County drawn into Senate District 4 has a BVAP of 51.03%, whereas the remainder of Nash County has a BVAP of only 25.78%. Defs.' Answer to Am. Compl. ("Answer") ¶ 75, ECF No. 14. Similarly, the portion of Wilson County assigned to Senate District 4 has a BVAP of 63.62%, whereas the remainder of the county has a BVAP of only 24.10%. *Id.* ¶ 77. Additionally, Senate District 4 captures roughly 52% of the city of Rocky Mount in eastern Nash County, but manages to grab 84.26% of the voting-age African- Americans who reside in that city. Third Joint Stip. ¶ 8; Joint Ex. 1003 at 104. In the two split precincts, 82.2% of the voting-age African-Americans were assigned to Senate District 4. Third Joint Stip. ¶ 6. Finally, the racial density map demonstrates that the boundaries in the split

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[23] The record contains statistical information on each enacted district, including a list of the municipalities in each district and the percentage of the municipalities' population found in that district. *See* Joint Ex. 1003 at 86-117 (for the Enacted Senate Plan); Joint Ex. 1004 at 104-41 (for the Enacted House Plan). Municipalities are listed in these exhibits even when a district splits a city by capturing a de minimis amount of the population. *See, e.g.*, Joint Ex. 1003 at 104 (noting that Senate District 4 contains 0.55% of the city of Red Oak). We adopt a definition more friendly to Defendants and consider a municipality "split" when the population is divided between two districts, and each district contains at least 10% of the voters in that city.

counties in enacted Senate District 4 seem to trace areas that have a high proportion of African-Americans. *Id.* ¶ 18.

When viewed in conjunction with the strong statewide evidence, the district-specific evidence confirms that race was the predominant motive in drawing Senate District 4.

2. Senate District 5

Enacted Senate District 5 is a majority-black district located in Wayne, Greene, Pitt, and Lenoir Counties. The benchmark version of Senate District 5 had a BVAP of 30.14% under the 2000 census and 30.99% under the 2010 census. Third Joint Stip. ¶ 20. Enacted Senate District 5 was drawn with a BVAP of 51.97%, thus achieving the Redistricting Chairs' 50%-plus-one target. *Id.* ¶ 21; Joint Ex. 1003 at 120. The Chairs identified Senate District 5 as a proposed VRA district in the Senate VRA map, and the enacted district substantially comports with the proposed district's shape, location, and BVAP. Joint Ex. 1001 at 1, 67; Joint Ex. 1003 at 1, 120; Pls.' Ex. 2072 at 2. Further, Senator Rucho stated during debate on the Senate floor that "Senate District 5 has been drawn in such a way as to include a 50 percent-plus b[l]ack voting age population to rectify" a perceived VRA violation. Joint Ex. 1015 at 93.

Enacted Senate District 5 is centered on Greene County, which is kept whole. The rest of the district, however, is much more irregular: one portion expands east to capture a substantial but oddly shaped portion of Pitt County; a narrow, hook-shaped appendage reaches west from Greene County into Wayne County; and the final appendage stretches

south from Greene County to capture portions of Lenoir County. The district is visually less compact than the benchmark district, Pls.' Ex. 2012 at 2, and is less compact on eight of the eight measures presented by Mr. Fairfax, Pls.' Ex. 2094 at 18, 20.

Enacted Senate District 5 substantially overlaps with the benchmark version of the district. It too was centered on Greene County and contained portions of Pitt and Wayne Counties, although it did not reach into Lenoir County. Defs.' Ex. 3000 at 155. To increase the BVAP of this district by roughly 21%—without drastically relocating the district—the Chairs necessarily carved out white voters and added a large number of African-American voters. Thus, enacted Senate District 5 was drawn to include 38,250 fewer white persons and 38,181 more African-Americans than the benchmark version. Third Joint Stip. ¶ 22.

To achieve such a dramatic change in demographics, enacted Senate District 5 divides three counties, six municipalities, and forty precincts. *Id.* ¶ 23; Joint Ex. 1003 at 8-9, 104-05. These divisions appear to be motivated largely by race. For instance, the portion of Pitt County in Senate District 5 has a BVAP of 64.59%, while the remainder of Pitt County—assigned to majority-white Senate District 7—has a BVAP of only 16.16%. Answer ¶ 85. Lenoir and Wayne Counties were similarly divided such that the portions of the counties in Senate District 5 contain a substantially higher BVAP than the portions excluded from the district. *Id.* ¶ 83, 87. Further, 70.6% of the voting-age African-Americans

in the forty divided precincts were assigned to Senate District 5. Third Joint Stip. ¶ 24.

Finally, the racial density map supports the conclusion that race was the predominant motive in drawing the district's lines. Third Joint Stip. ¶ 33. And Plaintiff Julian Pridgen, a resident of Lenoir County, testified that certain irregular portions of Senate District 5 capture areas that are "heavily concentrated with African-Americans" such as the cities of Kinston and La Grange. Trial Tr. vol. I, 211:1-8.

When viewed in conjunction with the strong statewide evidence, the district-specific evidence confirms that race was the predominant motive in drawing Senate District 5.

3. Senate District 14

Enacted Senate District 14 is a majority-black district located entirely in Wake County. The 2003 version of Senate District 14 had a BVAP of 41.01% under the 2000 census and 42.62% under the 2010 census. Third Joint Stip. ¶ 35. Enacted Senate District 14 was drawn with a BVAP of 51.28%, thus achieving the Redistricting Chairs' 50%-plus-one goal. *Id.* ¶ 36; Joint Ex. 1003 at 120.

In Dr. Hofeller's initial study of the state's demographics, he determined that a majority-black district could be drawn in Wake County, and proceeded to do so. Defs.' Ex. 3028 at 18. The Chairs identified Senate District 14 as a proposed VRA district in the Senate VRA map, and the enacted district substantially matches the proposed district's shape, location, and BVAP. Joint Ex. 1001 at 1, 67; Joint Ex. 1003 at 1, 120; Pls.' Ex. 2072 at 3.

Enacted Senate District 14 is located entirely within Wake County, but is part of a two-county grouping of Wake and Franklin Counties. The majority of the population of Senate District 14 comes from the southeastern portion of the city of Raleigh. Joint Ex. 1003 at 108. The benchmark version of Senate District 14 was also located entirely within Wake County, and included a portion of Raleigh. Defs.' Ex. 3000 at 155. Senator Dan Blue, who represents Senate District 14, testified that the Benchmark Senate Plan divided Wake County roughly "into four quadrants." Trial Tr. vol. I, 50:21-51:6. Benchmark Senate District 14 was more rectangular and traveled "along the county line" for a significant portion of the boundary. *Id.* at 51:6-7. In contrast, Senator Blue described enacted Senate District 14 as a "crab" with "things that look like claws" and "pincers" reaching out from the core of the district. *Id.* at 52:7-10. Our own independent assessment confirms that Senate District 14 is visually less compact and more irregular than its predecessor. Pls.' Ex. 2012 at 3. Additionally, it is less compact on eight of the eight compactness measures evaluated by Mr. Fairfax. Pls.' Ex. 2094 at 18, 20.

Benchmark Senate District 14 was overpopulated by 41,804 persons according to the 2010 census. Third Joint Stip. ¶ 37. The General Assembly thus had to remove a large number of individuals from the district to comply with one person, one vote requirements. However, compared to its benchmark, enacted Senate District 14 contains 2,145 fewer African-Americans and 38,040 fewer white persons. *Id.* Senator Blue testified that

"effectively what they did is [they] took only the white voters out in order to get [the population] down." Trial Tr. vol. I, 68:21-24.

Additionally, Senate District 14 divides three municipalities, seemingly on the basis of race. Joint Ex. 1003 at 108. For instance, the district includes 36.29% of the city of Raleigh but this portion of Raleigh contains 65.44% of the city's African-American voting-age population. Third Joint Stip. ¶ 40; Joint Ex. 1003 at 108. The enacted district also divided twenty-nine of the fifty-one precincts in the district. Third Joint Stip. ¶ 38, Joint Ex. 1003 at 18-19. Dr. Hofeller testified that he divided these precincts to achieve the "goal" of "creat[ing] a majority-minority district." Pls.' Notice of Filing of Designated Dep. Test. Ex. 1 ("Pls.' Designated Deps."), at 306, ECF No. 102. In addition, Senate District 14's racial density map supports the conclusion that the strange appendages that cut through precincts assign areas with a greater proportion of African-Americans to Senate District 14, leaving areas with a small proportion of African-Americans in the neighboring districts.[24] *See* Third Joint Stip. ¶ 51.

Thus it appears that traditional districting criteria were subordinated to race to draw this district. When viewed in conjunction with the direct evidence of the legislature's intent to create a majority-black district in Wake County, we conclude

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[24] Senator Blue testified, based on his own knowledge of Wake County, that the "oddly shaped" appendages in the district can be explained by "the effort . . . to bring black voters into District 14." Trial Tr. vol. I, 52:7-13.

that race predominated in drawing Senate District 14.

4. Senate District 20

Enacted Senate District 20 is a majority-black district made up of Granville County and part of Durham County. The 2003 version of Senate District 20 had a BVAP of 44.58% under the 2000 census, and 44.64% under the 2010 census. Third Joint Stip. ¶ 53. Enacted Senate District 20 was drawn with a BVAP of 51.04%, and therefore achieves the Chairs' goal of drawing each VRA district above 50% BVAP. *Id.* ¶ 54; Joint Ex. 1003 at 120.

In Dr. Hofeller's initial study of the state's demographics, he determined that a majority-black district could be drawn in this area of the state. Defs.' Ex. 3028 at 18. He then drew Senate District 20 as a proposed VRA district in the Senate VRA map, and the enacted district substantially accords with the proposed VRA district's shape, location, and BVAP. Joint Ex. 1001 at 1, 67; Joint Ex. 1003 at 1, 120; Pls.' Ex. 2072 at 4.

Enacted Senate District 20 includes the entirety of Granville County and part of Durham County. Benchmark Senate District 20 was contained entirely within Durham County. Defs.' Ex. 3000 at 155. While the Granville County portion of the enacted district follows county lines, the Durham portion is oddly shaped. Plaintiff Milo Pyne, a resident of Durham, described the shape as "very eccentric," noting that it "goes off in little squiggles to capture particular census blocks." Trial Tr. vol. II, 155:19, 22-24. Representative Larry Hall, who represents House District 29 in Durham County, testified that enacted

Senate District 20 is a "cutout" of areas in the city of Durham with a high African-American population, connected by a "bridge" to the Granville County portion of the district. *Id.* at 198:22-25. We find that enacted Senate District 20 is less visually compact than its predecessor, Pls.' Ex. 2012 at 4, and note that it is less compact on seven of the eight compactness measures assessed by Mr. Fairfax.[25] Pls.' Ex. 2094 at 18, 20.

Plaintiffs allege, and the evidence introduced at trial suggests, that the pairing of Durham and Granville Counties demonstrates a disregard for communities of interest. *See* Pls.' Post-trial Revised Proposed Findings of Fact and Conclusions of Law ("Pls.' Post-trial Findings") 23, ECF No. 113. Representative Hall testified that many residents in Durham are part of the "university economy," and described the county's economy overall as being dominated by "light industry, commerc[e] and . . . [the] service industry, [the] university industry, and [the] medical [industry]." Trial Tr. vol. II, 186:2, 199:15-16. Granville County, on the other hand "is a primar[ily] agricultural area with some light industry." *Id.* at 199:11-12. In Representative Hall's opinion, there are almost no commonalities between the communities in Granville and those in Durham, aside from the fact that both contain

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[25] The only measure on which Senate District 20 became marginally more compact was the Ehrenburg score, and the increase was minimal. Benchmark Senate District 20 had an Ehrenburg score of 0.32, while the enacted version had a score of 0.35. Pls.' Ex. 2094 at 18, 20.

significant African-American populations. *Id.* at 199:5-10.

Additionally, Senate District 20 divides the city of Durham, seemingly on the basis of race. The enacted district contains 53.29% of the city of Durham, but manages to grab 76.94% of Durham's African-American voting-age population. Third Joint Stip. ¶ 58; Joint Ex. 1003 at 109.

The way that the city of Durham was divided is notable: the Enacted Plan splits thirty-five of the forty-nine precincts contained in the Durham County portion of Senate District 20. Joint Ex. 1003 at 23-24; Trial Tr. vol. II, 155:18-21 (Pyne). In other words, over 70% of the precincts in the Durham County portion of Senate District 20 are split. In contrast, benchmark Senate District 20 split only four precincts. Third Joint Stip. ¶ 56; Trial Tr. vol. II, 155:8-12 (Pyne). Moreover, in the enacted district's split precincts, 63.8% of the African-American voting-age population is assigned to Senate District 20. Third Joint Stip. ¶ 57. Dispelling the possibility that such racial divisions occurred by chance, Dr. Hofeller testified that the precincts in District 20 were split in order to draw the district above 50% BVAP. Pls.' Designated Deps. at 308-09.

According to an election administrator for the Durham County Board of Elections, the enacted district not only splits significantly more precincts, but also splits precincts "in a much more complicated manner" than any previous plan. Pls.' Ex. 2101 at 1, 3. For instance, some of the splits run along "minor roads that only span one or two blocks." *Id.* at 3. Within the split precincts, the boundaries of Senate

District 20 divide neighborhoods, apartment complexes, and even *individual homes*. Pls.' Ex. 2102 at 1-12 (Letter from Joseph Fedrowitz, Geographer and Absentee by Mail Coordinator for the Durham County Board of Elections). This evidence strongly suggests that Defendants were unwilling to compromise on their 50%-plus-one goal in this district, even at the expense of traditional considerations such as existing political boundaries and communities of interest.

Finally, Plaintiffs put forth evidence that the precise contours of the district were determined by race. Mr. Pyne testified that predominantly white neighborhoods, such as Forrest Hills and communities around Southpoint Mall, were notably excluded from Senate District 20. Trial Tr. vol. II, 163:11-165:7. On the other hand, neighborhoods with substantial African-American populations, such as West End, Old Farm, and the area surrounding North Carolina Central University, were captured by the bizarre district lines. *Id.* at 164:3-8, 165:16-25, 166:14-18. The racial density map supports Mr. Pyne's testimony that race substantially explains the placement of the district's boundaries. Third Joint Stip. ¶ 68.

When viewed in conjunction with the strong statewide evidence, the district-specific evidence confirms that race was the predominant motive in drawing Senate District 20.

5. Senate District 21

Senate District 21 is a majority-black district which gets more than half of its population from the city of Fayetteville, North Carolina. Joint Ex. 1003 at

109. In his initial review of the state's demographics, Dr. Hofeller determined that he could create a majority-black Senate district "anchored in Cumberland County." Defs.' Ex. 3028 at 18. The benchmark version of Senate District 21 had a BVAP of 41.00% based on the 2000 census, which grew to 44.93% under the 2010 census. Third Joint Stip. ¶ 70. Enacted Senate District 21 has a BVAP of 51.53%, thus meeting the Chairs' goal of drawing each VRA district above 50% BVAP. *Id.* ¶ 71; Joint Ex. 1003 at 120.

Benchmark Senate District 21 was a "squarely shaped" district located in the northwestern quadrant of Cumberland County. Trial Tr. vol. II, 99:8-13 (Covington); Defs.' Ex. 3000 at 155. During the 2011 redistricting process, the Chairs released the Senate VRA map, which contained a proposed version of Senate District 21 located in the same northwestern quadrant of Cumberland County but with a more contorted and irregular shape. Joint Ex. 1001 at 1. After the release of the Senate VRA map, Senator Rucho significantly altered the proposed district by adding the entirety of Hoke County, Cumberland County's neighbor to the west. *Id.*; Joint Ex. 1003 at 1; Pls.' Ex. 2072 at 5. The evidence indicates that Hoke County was added to this district because it was a Section 5 county, and therefore the Chairs determined that it should be in a 50%-plus-one district. Joint Ex. 1007 at 3; Joint Ex. 1013 at 41-42; Trial Tr. vol. IV, 45:13-21 (Rucho).

To accommodate the population of Hoke County, while maintaining a BVAP above 50%, the portion of the district in Cumberland County became even more

bizarre in its shape. The portion of enacted Senate District 21 in Cumberland County contains multiple appendages, which are so thin and oddly shaped that it is hard to see exactly where the district begins and ends. *See* Pls.' Ex. 2012 at 5. Some portions of the district are so narrow that the district is nearly non-contiguous.

Eric Mansfield, the former Senator from Senate District 21, described the enacted district as "squid"- or "crab"-shaped. Trial Tr. vol. II, 120:6-7. Roberta Waddle, a Cumberland County resident, stated that the district had "long reaching fingers that divide our community in a nonsensical manner." Pls.' Ex. 2105 at 2 (Aff. of Roberta Waddle in *Dickson v. Rucho*). Plaintiff Sandra Covington, who also lives in Cumberland County, described the district as "fragmented" and "non-compact." Trial Tr. vol. II, 99:16. She explained that the bizarre shape of the district has created a lot of confusion among voters, since individuals in the same neighborhoods are often assigned to different districts. *Id.* at 100:18-25. Our own assessment of the district accords with these descriptions. Enacted Senate District 21 is not only less visually compact than the benchmark district, Pls.' Ex. 2012 at 5, but it is also less compact on all eight compactness measures presented by Mr. Fairfax, Pls.' Ex. 2094 at 18, 20.

Enacted Senate District 21 also appears to divide traditional political boundaries on the basis of race. First, the district divides three municipalities. Joint Ex. 1003 at 109. Most notably, enacted Senate District 21 divides the city of Fayetteville: it contains 55.16% of Fayetteville's overall population, but

75.70% of the voting-age African-Americans in the city. Third Joint Stip. ¶ 75; Joint Ex. 1003 at 109. Enacted Senate District 21 also includes 45.20% of the town of Spring Lake, but 69.87% of that town's African-American voting-age population. Third Joint Stip. ¶ 76; Joint Ex. 1003 at 109.

Additionally, the enacted district divides thirty-three of the forty-one precincts located in the Cumberland County portion of the district (roughly 80%). Third Joint Stip. ¶ 73; Joint Ex. 1003 at 24-25. Only one precinct was divided in the benchmark district. Third Joint Stip. ¶ 73; Trial Tr. vol. II, 121:4-8 (Mansfield). Within those split precincts, 60.3% of the African-American voting-age population was assigned to Senate District 21. Third Joint Stip. ¶ 74. According to Dr. Hofeller, these precincts had to be divided in order to achieve the 50%-plus-one BVAP goal for this district. Pls.' Designated Deps. at 307.

Finally, the racial density map supports the conclusion that race was the predominant motive in drawing the district's lines. Third Joint Stip. ¶ 86. Testimony from those familiar with the Fayetteville area supports this conclusion. Former Senator Mansfield said that the lines appear to be "capturing black neighborhoods." Trial Tr. vol. II, 122:6-9. Plus, both Sandra Covington and Reva McNair—residents and voters in Cumberland County—identified specific predominantly African-American neighborhoods that were encompassed by the oddly shaped lines of the enacted district. *Id.* at 100:2-7 (Covington); Pls.' Ex. 2108 at 4 (Second Aff. of Reva McNair in *Dickson v. Rucho*).

In conclusion, both the statewide and the district-specific evidence confirms that race was the predominant motive in drawing Senate District 21.

6. Senate District 28

Enacted Senate District 28 is a majority-black district in Guilford County. The benchmark version of Senate District 28, enacted in 2003, had a BVAP of 44.18% under the 2000 census and 47.20% under the 2010 census. Third Joint Stip. ¶ 88. As enacted in 2011, Senate District 28 has a BVAP of 56.49%. Third Joint Stip. ¶ 89; Joint Ex. 1003 at 120.

In Dr. Hofeller's initial study of the state's demographics, he determined that a majority-black district could be drawn in Guilford County, and proceeded to do so. Defs.' Ex. 3028 at 18. The Redistricting Chairs identified Senate District 28 as a proposed VRA district in the Senate VRA map, and the district was enacted without substantial changes to the proposed district's shape, location, or BVAP. Joint Ex. 1001 at 1, 67; Joint Ex. 1003 at 1, 120; Pls.' Ex. 2072 at 6. Dr. Hofeller testified that Senate District 28 was drawn to achieve the 50%-plus-one goal. Pls.' Designated Deps. at 309.

The city of Greensboro forms the primary population center in Senate District 28. Joint Ex. 1003 at 111. Although the portion of the district in Greensboro is not particularly strange in its shape, an arm of the district protrudes west, then hooks south, to capture part of the city of High Point. *See* Trial Tr. vol. I, 197:8-11 (Yvonne Johnson) (describing the enacted district as more "far reaching" and "fragmented" than its benchmark). The enacted district is visually less compact than the

benchmark district, Pls.' Ex. 2012 at 6, and is less compact on five of the eight compactness measures reported by Mr. Fairfax, Pls.' Ex. 2094 at 18, 20.

Both the enacted district and the benchmark district were located entirely within Guilford County. The benchmark district was underpopulated by 13,673 people. Third Joint Stip. ¶ 90. As drawn in 2011, the enacted district includes 12,508 *fewer* white persons and 30,773 *more* African-Americans. *Id.*

To achieve this dramatic demographic change, enacted Senate District 28 splits two municipalities, seemingly on racial lines. Joint Ex. 1003 at 111. The enacted district contains 57.69% of the population of the city of Greensboro, but manages to capture 82.45% of the African-American voting-age population in that city. Third Joint Stip. ¶ 93; Joint Ex. 1003 at 111. Enacted Senate District 28 also includes only 35.25% of the population of High Point, but over 60% of High Point's African-American voting-age population. Third Joint Stip. ¶ 94; Joint Ex. 1003 at 111.

Enacted Senate District 28 also splits fifteen precincts, more than twice as many as the benchmark district. Third Joint Stip. ¶ 91. In those fifteen split precincts, 70.4% of the voting-age African-Americans were assigned to Senate District 28. *Id.* ¶ 92. Dr. Hofeller testified that the precincts were divided in this district in order to achieve the goal of drawing it above 50% BVAP. Pls.' Designated Deps. at 309.

Finally, Yvonne Johnson, a long-time Greensboro resident who has served as the mayor of Greensboro and currently serves as a Greensboro City Council

member, testified that the portion of the district that reaches into High Point grabs "an African-American community" in that area. Trial Tr. vol. I, 191:15-192:10, 197:8-11. The racial density map supports this conclusion: the boundary lines of Senate District 28 outline areas with a high proportion of African-Americans. Third Joint Stip. ¶ 104.

Based on this district-specific evidence, in conjunction with the statewide evidence of legislative intent, we conclude that race predominated in drawing Senate District 28.

7. Senate District 32

Senate District 32, as enacted, has a BVAP of 42.53% and is located entirely in Forsyth County. Third Joint Stip. ¶ 107. Enacted Senate District 32 is unique in this case, because it is the only challenged district that was not drawn above 50% BVAP. Thus, enacting this district did not further the Chairs' statewide goal to increase the number of districts with a 50%-plus-one BVAP. Our analysis of Senate District 32 therefore relies primarily upon district-specific evidence to determine whether race predominated in drawing this district. We find that it did.

The benchmark version of Senate District 32 was located in roughly the same location as the enacted district—also entirely within Forsyth County. Pls.' Ex. 2012 at 7. Benchmark Senate District 32 had a BVAP of 41.42% under the 2000 census and 42.52% under the 2010 census. Third Joint Stip. ¶ 106.

When the 2011 redistricting process began, the Chairs concluded that it was not possible to draw a majority-black district in Forsyth County. Joint Ex.

1005 at 6 (June 17, 2011, Joint Statement by Redistricting Chairs) ("Chairman Rucho believes that it is not possible to create a majority black Senate district in Forsyth."); Joint Ex. 1006 at 2 (Joint Statement by Redistricting Chairs Prior to June 23, 2011, Public Hearing) ("Senate District 32 is not a majority black district because of the absence of sufficient black population in Forsyth County.").

The Senate VRA map, released on June 17, included a version of Senate District 32 with a BVAP of 39.32%. Joint Ex. 1001 at 67; Joint Ex. 1005 at 6. Proposed Senate District 32, as it appeared on that map, was fairly regular in shape. It followed the county boundary on its south side, and only split one precinct. Pls.' Ex. 2072 at 7; Pls.' Designated Deps. at 310. Senator Rucho explained to the Senate Redistricting Committee that the "Forsyth County population doesn't meet the level of a complete Voting Rights Act district, and, therefore, what we tried to do is develop what would be a coalition district with the black voting age population and the Hispanic voting age population." Joint Ex. 1013 at 17.

On June 23, a group called the Alliance for Fair Redistricting and Minority Voting Rights (AFRAM) submitted information and proposed district maps to the General Assembly. Defs.' Ex. 3013-11 at 2. On its proposed Senate map, AFRAM recommended that Senate District 32 be drawn with a 41.95% BVAP. Defs.' Ex. 3000 at 169.[26] After receiving this

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[26] The map was submitted on behalf of AFRAM by a representative from the Southern Coalition for Social Justice. Defs.' Ex. 3013-11 at 2. Thus, it is labeled in the record as the

information, the Chairs announced that the BVAP in Senate District 32 would be increased to 42.53%, which would "exceed[] the percentage suggested for that district by [AFRAM]," Joint Ex. 1007 at 3, and exceed the BVAP of the benchmark district.

Both Senator Rucho and Dr. Hofeller testified at trial that the BVAP of Senate District 32 was purposefully increased to exceed the percentage recommended in the AFRAM map. Trial Tr. vol. IV, 38:9-12 (Rucho) ("We tried to go along with the AFRAM plan."); Trial Tr. vol. V, 32:1-7 (Hofeller) ("[W]e felt that in order to avoid a complaint about that district, we should raise that district's percentage slightly above the percentage of that district on the AFRAM map."); *see also* Defs.' Ex. 3028 at 20 (Hofeller) ("This minority percentage was intended to meet the minority percentage contained in the [AFRAM] map for this district, which it did."). Senator Rucho also opined that increasing the BVAP above that of the AFRAM map and the benchmark district would improve the state's chances of obtaining Section 5 preclearance from the Justice Department. Trial Tr. vol. IV, 29:19-30:2.

To reach a BVAP of 42.53% for Senate District 32, Dr. Hofeller had to markedly reduce its compactness, carving out neighborhoods in the center of the district and adding jagged protrusions on the outer edge. Pls.' Ex. 2072 at 7. In drawing the enacted district, he changed almost every mile of proposed Senate District 32's boundaries. *Id.* While

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Southern Coalition for Social Justice map. Defs.' Ex. 3000 at 166.

the proposed district split one precinct, the enacted district split forty-three. Third Joint Stip. ¶ 109; Joint Ex. 1003 at 38-40. The result was a district that was less visually compact than the versions of Senate District 32 in both the Benchmark Plan and the Senate VRA map.[27]

At trial, Senator Rucho testified that "the change in the shape" which occurred between the release of the Senate VRA map and the enactment of the district was "a result of the increase in the black voting-age population in the district," which was done to "go along with the AFRAM plan." Trial Tr. vol. IV, 38:9-12.

Senator Rucho's testimony that the change in shape was explainable only by race is supported by the demographic evidence. While Senate District 32—located entirely within Forsyth County—has a BVAP of 42.53%, the remainder of Forsyth County has a BVAP of only 7.19%. Answer ¶¶ 126-127. Senate District 32 also splits two municipalities, seemingly on the basis of race. Third Joint Stip. ¶¶ 110-11; Joint Ex. 1003 at 112. For instance, enacted Senate District 32 includes 73.62% of the city of Winston-Salem, but 94.27% of Winston-Salem's African-American voting-age population. Third Joint Stip. ¶ 111; Joint Ex. 1003 at 112. Additionally, roughly 80% of the voting-age African-Americans who lived in the precincts split by this district were assigned to Senate District 32. Third Joint Stip. ¶ 110.

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[27] Enacted Senate District 32 is also less compact than the benchmark district on seven of the eight compactness measures presented by Mr. Fairfax. Pls.' Ex. 2094 at 18, 20.

One split precinct in Senate District 32 is particularly notable, because Senator Rucho split the precinct in order to carve a white incumbent out of the district. Linda Garrou, a white Democrat, had represented Senate District 32 since 1999. Third Joint Stip. ¶ 112; Defs.' Ex. 3016 at 10. She resided in Precinct 908, which was excluded from the proposed version of Senate District 32 on the Senate VRA map. Joint Ex. 1001 at 13; Joint Ex. 1050 at 164. Precinct 908 was then partially added back into the enacted district as a split precinct—although Linda Garrou's residence, notably, remained excluded. Joint Ex. 1001 at 13; Joint Ex. 1003 at 40; Joint Ex. 1050 at 164-65.

When they released the Senate VRA map, the Chairs publicly announced Senator Rucho's recommendation "that the current white incumbent for the Forsyth Senate district not be included in the proposed Senate District 32." Joint Ex. 1005 at 6. Senator Rucho, during both the 2011 redistricting and the trial in this case, made clear that Ms. Garrou was drawn out of her district because of her race. *See* Joint Ex. 1015 at 91 ("We have also removed the white incumbent from the district who has previously defeated African-American primary challenges, and we think that this will provide the minority community within the district with a better opportunity to elect a candidate of their choice."); Trial Tr. vol. IV, 55:13-19 (Rucho) (agreeing that the incumbent was drawn out of Senate District 32 "because the candidate was white and had defeated a b[l]ack candidate"). Thus, the division of Precinct 908

appears to have been predominantly motivated by race—the race of Linda Garrou.[28]

The statements of Senator Rucho and Dr. Hofeller establish that race was the key factor that explains the contours of Senate District 32. Although the Redistricting Chairs were willing to draw Senate District 32 below their 50%-plus-one BVAP target, they substituted a different racial target: the BVAP of the AFRAM map's proposed district. To accomplish their goal of reaching a BVAP around 42%, they compromised compactness and respect for political boundaries. In sum, the district-specific evidence clearly demonstrates that race predominated in drawing Senate District 32.

8. Senate Districts 38 and 40

Enacted Senate Districts 38 and 40 are both majority-black districts located entirely within Mecklenburg County. Under the Benchmark Plan, Mecklenburg County was paired with Union County to form a two-county group. There were four Senate districts located entirely within Mecklenburg County, and one comprised of a portion of Mecklenburg and the entirety of Union County. Defs.' Ex. 3000 at 155.

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[28] It is not clear whether the addition or removal of a single person on the basis of race could be sufficient to establish that race predominated in drawing a district. *See Miller*, 515 U.S. at 916 (holding that a plaintiff must show that race motivated "the legislature's decision to place *a significant number of voters* within or without a particular district" in order to establish racial predominance (emphasis added)). We need not reach this issue, however, in light of the substantial direct evidence that a significant number of voters, in addition to Garrou, were excluded from Senate District 32 on the basis of race.

None of the Mecklenburg County districts in the Benchmark Plan had a BVAP above 50%. *Id.* at 151, 158. Benchmark Senate District 38 was the only one with a BVAP above 40%: it was drawn in 2003 at 47.69% BVAP based on the 2000 census, and decreased to 46.97% under the 2010 census. Third Joint Stip. ¶ 121. Benchmark Senate District 40 had a BVAP of 31.11% under the 2000 census and 35.43% under the 2010 census. *Id.* ¶ 138.

By the 2011 redistricting, population growth in Mecklenburg County allowed for the county to be a single-county group made up of five complete Senate districts. In Dr. Hofeller's "initial study of the State's demographics," he "quickly determined" that it was possible to draw two majority-black districts in Mecklenburg County. Defs.' Ex. 3028 at 18 (Hofeller). He proceeded to do so, and the Chairs subsequently released Senate Districts 38 and 40 as proposed VRA districts on the Senate VRA map. Joint Ex. 1001 at 1. Senate Districts 38 and 40 were enacted without substantial changes to the shape, location, or BVAP of the proposed VRA districts. *Id.* at 1, 67; Joint Ex. 1003 at 1, 120; Pls.' Ex. 2072 at 8, 9. As enacted in 2011, Senate District 38 had a BVAP of 52.51% and Senate District 40 had a BVAP of 51.84%, thus meeting the 50%-plus-one target. Third Joint Stip. ¶¶ 122, 139.

Senate Districts 38 and 40 are not as sprawling or bizarre in shape as many of the other challenged districts. Both are located in the densely populated urban area of Charlotte, North Carolina. Senate District 38 is the only challenged Senate district that was more compact than its benchmark version on

five of the eight compactness measures calculated by Mr. Fairfax. Pls.' Ex. 2094 at 18, 20. Senate District 40, on the other hand, was *less* compact on five of the eight compactness measures. *Id.* Of the two, Senate District 40 is more unusually shaped. It curves around the northern and western portions of Charlotte, almost encircling a portion of downtown Charlotte that was assigned to Senate District 37, a majority-white district. *See* Joint Ex. 1003 at 1, 120.

The existence of a relatively compact African-American population in the Charlotte area suggests that it may have been possible to draw a majority-black district in this area without race predominating. But the fact that a district is somewhat compact, on its own, does not foreclose the possibility that race was the predominant factor in the creation of that district. *See Shaw II*, 517 U.S. at 907 (explaining that a state's attention to certain legitimate, traditional interests in drawing a district "does not in any way refute the fact that race was the legislature's predominant consideration"); *Miller*, 515 U.S. at 912 (explaining that the Court's consideration of compactness "was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation"). Here, Plaintiffs put forth extensive evidence that race did predominate in drawing these districts. Not only were Senate Districts 38 and 40 part of the statewide plan to increase the BVAP in numerous districts to hit a 50%-plus-one target, but the district-specific evidence suggests that race was the driving criterion explaining the "contours" of the district boundaries. *See LULAC*, 548 U.S. at 433.

First, the impact of Senate Districts 38 and 40 on the compactness of the remaining districts in Mecklenburg County is notable. Because the Chairs drew Senate Districts 38 and 40 first, and determined that they had to be majority-black districts, the other Mecklenburg County districts had to be drawn around them. As a result, majority-white Senate District 41 (which is not challenged in this case) had to contain the northernmost portion of Mecklenburg County, then follow a long, thin strip of land along the entire eastern border of Mecklenburg County to connect it to the southeastern corner of the county. Joint Ex. 1003 at 1, 120. This land bridge is made primarily of precincts that are split between Senate District 41 and Senate Districts 38 and 40.[29] Pls.' Ex. 2012 at 8-9. In fact, Senate District 41 is nearly non-contiguous: at one point the northern portion of the narrow land bridge is connected to the southern portion solely by a freeway interchange, where no individuals live. Trial Tr. vol. II, 62:6-19 (Daniel Clodfelter). The evidence thus suggests that the compactness and contiguity of Senate District 41 were compromised in order to create two majority-black districts in Senate Districts 38 and 40.

The demographic evidence also indicates that the city of Charlotte was divided along racial lines. Senate Districts 38 and 40 contain 23.36% and 24.54% of the population of the city of Charlotte, respectively. Joint Ex. 1003 at 114. Because Charlotte is such a large city—with a population over 731,000 according to the 2010 census—it necessarily

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[29] Senate Districts 38 and 40 split eight and sixteen precincts, respectively. Third Joint Stip. ¶¶ 124, 141.

had to be divided into multiple districts. *Id.*; *see* Defs.' Ex. 3069 at 22. However, the way it is divided suggests that race played a significant role: 72.78% of the city's African-American voting-age population is assigned to either Senate District 38 or 40, with the remainder divided among Senate Districts 37, 39, and 41. Third Joint Stip. ¶ 126.

Finally, viewing the district boundaries in conjunction with the racial make-up of the city of Charlotte confirms that the precise contours of these districts are explainable by race. *See* Third Joint Stip. ¶ 151 (racial density map for the Charlotte area). The former mayor of Charlotte, former state Senator from Senate District 40, and long-term Charlotte resident Daniel Clodfelter testified extensively about the precise neighborhoods and communities depicted by the racial density map of Senate Districts 38 and 40. Trial Tr. vol. II, 42:14-44:17; 56:22-67:11. Clodfelter identified particular neighborhoods and communities with large African-American populations that were assigned to Senate Districts 38 and 40, even when that required splitting precincts or transgressing traditional boundary lines. *Id.* at 56:22-67:11. He also pointed to predominantly white neighborhoods that appear to have been intentionally carved out of the majority-black districts. *Id.* at 57:7-58:9, 64:24-65:19. Altogether, the evidence suggests that Dr. Hofeller carefully drew Senate Districts 38 and 40 to reach a BVAP above 50%, without regard for political, natural, or community boundaries. *Id.* at 63:24-64:1.

When viewed together with the statewide evidence, the district-specific evidence confirms that

race predominated in drawing Senate Districts 38 and 40.

9. House District 5

Enacted House District 5 is a majority-black district in northeastern North Carolina. The benchmark version of House District 5 had a BVAP of 49.02% under the 2000 census and 48.87% under the 2010 census. Third Joint Stip. ¶ 153. Enacted House District 5 has a BVAP of 54.17%, thus achieving the Redistricting Chairs' goal of increasing the BVAP above 50%. *Id.* ¶ 154; Joint Ex. 1004 at 147. The Chairs identified House District 5 as an intended VRA district in their House VRA map.[30] Joint Ex. 1002 at 1. House District 5 was thereafter enacted without substantial changes to its shape, location, or BVAP. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147; Pls.' Ex. 2072 at 10.

Both the benchmark and the enacted version of House District 5 contain three whole counties: Gates, Hertford, and Bertie. However, the benchmark contained a fourth whole county, Perquimans, which was removed from the district in the enacted plan and replaced with a portion of Pasquotank County.

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[30] Enacted House District 5 was labeled as district 2 on the House VRA map. The first proposed VRA map, released on June 17, 2011, had a different configuration for this district but accidentally excluded the residence of incumbent Representative Annie Mobley from the proposed district. According to Representative Lewis, they corrected the map and redrew this district so that Representative Mobley, an African-American, would be in the majority-black House District 5, and in doing so they changed the county groupings. Trial Tr. vol. III, 182:16-183:1.

Joint Ex. 1004 at 1; Pls.' Ex. 2022 at 1; Defs.' Ex. 3001 at 326. Enacted House District 5 is less compact than the benchmark on four of the eight compactness measurements calculated by Mr. Fairfax. Pls.' Ex. 2094 at 45, 58. Although enacted House District 5 is not significantly less compact than its predecessor, other factors indicate that race predominated in drawing the district. *See Shaw II*, 517 U.S. at 907; *Miller*, 515 U.S. at 912—13.

House District 5 splits Pasquotank County, seemingly on the basis of race. Within Pasquotank County, House District 5 splits six of the eleven precincts that are included in the district. Third Joint Stip. ¶ 156; Joint Ex. 1004 at 5. In the split precincts, 74.5% of the voting-age African-Americans were assigned to House District 5. Third Joint Stip. ¶ 157. The enacted district also splits Elizabeth City, the "economic and cultural center" of Pasquotank County and the surrounding area. Joint Ex. 1004 at 124; Trial Tr. vol. II, 88:2-5 (Claude Harris). Enacted House District 5 includes 86.57% of Elizabeth City, and 94.74% of the city's black voting-age population. Third Joint Stip. ¶ 158; Joint Ex. 1004 at 124. In addition, the racial density map supports the conclusion that the district divides Pasquotank County along racial lines. Third Joint Stip. ¶ 168.

Plaintiff Claude Harris testified at trial that, as a resident of Pasquotank County, he does not consider himself "economically or culturally" tied to the other counties in House District 5. Trial Tr. vol. II, 86:15-22. Mr. Harris explained that Pasquotank County is considered one of the five "Finger Counties" in the northeastern corner of the state, and

it used to be in a district with two other Finger Counties: Camden and Currituck. *Id.* at 86:8-88:2; Defs.' Ex. 3001 at 326. Under the Enacted Plan, the portion of Pasquotank County in House District 5 is no longer part of a district that includes any of the other Finger Counties. Thus, there is some circumstantial evidence that House District 5 divided communities of interest in order to meet the 50%-plus-one goal.

Finally, there is strong direct evidence that Representative Lewis and Dr. Hofeller drew House District 5 on the basis of race. Representative Lewis testified that House District 5 was "one of the districts that [he] drew to reach the [Chairs'] proportionality goal." Trial Tr. vol. III, 214:13-19. Representative Lewis also testified that he divided both Elizabeth City and "Pasquotank County so that [he] could get to 50 percent [BVAP] for House District 5." *Id.* at 215:1-6.

House District 5 also provides an example of how race predominated over attempts to comply with the WCP. Dr. Hofeller explained that the *Stephenson* cases would have required the eight-county group containing House District 5 (as well as House District 1) to "be split" unless there was a VRA district in that location. Defs.' Ex. 3028 at 14. Therefore, this district illustrates that when the 50%-plus-one goal and the WCP were in conflict, the WCP gave way to the racial target.

Thus, in accordance with their statewide goals, Dr. Hofeller and Representative Lewis drew House District 5 in a way that would increase its BVAP to

50%-plus-one. We conclude that race predominated in drawing this district.

10. House District 7

Enacted House District 7 is a majority-black district located in Franklin and Nash Counties. House District 7 has a BVAP of 50.67%. Third Joint Stip. ¶ 169; Joint Ex. 1004 at 147.

For House District 7, comparisons to the Benchmark Plan are particularly limited in value. Benchmark House District 7, which had a BVAP of 56.03% under the 2000 census and 60.77% under the 2010 census, Defs.' Ex. 3001 at 315, 332, included the majority of Halifax County and a small portion of Nash County, *id.* at 326. That small portion in Nash County, however, is the only part of benchmark House District 7 that remains in the enacted version.[31] Pls.' Ex. 2022 at 2. Otherwise, the district now contains a much larger portion of Nash County and a significant section of Franklin County, Joint Ex. 1004 at 1, areas that used to be in House Districts 25 and 49 under the Benchmark Plan, Defs.' Ex. 3001 at 326. Therefore, it is more appropriate to compare House District 7 to benchmark House Districts 25 and 49, which as drawn had BVAPs of 25.87% and 28.49%, respectively. Defs.' Ex. 3001 at 315.

The relocation of House District 7 appears to be the result of the Chairs' 50%-plus-one and

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[31] Benchmark House District 7 has for the most part been incorporated into enacted House District 27, a majority-black district that has not been challenged in this case. Joint Ex. 1004 at 1, 147; Defs.' Ex. 3001 at 326.

proportionality goals, since it allowed them to draw two majority-black districts in this area of the state—House Districts 7 and 27—where there was previously only one. House District 7 was identified in the House VRA map as a proposed VRA district,[32] and was enacted without substantial changes to the shape, location, or BVAP of the proposed district. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147.

The shape of House District 7 strongly suggests that race predominated in drawing this district. While the district's northern border tracks the northern boundaries of Franklin and Nash Counties, the remainder of the district takes the form of several strangely shaped protrusions, extending south into the two counties. Joint Ex. 1004 at 1. State Senator Angela Bryant, the former Representative for House District 7, testified that the district "was almost impossible to describe to constituents" because its "tentacles" cut through the counties in such strange ways. Trial Tr. vol. II, 14:22-25. Senator Bryant expressed her concerns before the General Assembly during the redistricting process, noting the "odd and irregular shape" of the district and its "lack of compactness." Joint Ex. 1020 at 150. Our own visual assessment of the district confirms that it is non-compact and bizarrely shaped. Enacted House District 7 is also less compact than the benchmark district on eight of the eight compactness measures reported by Mr. Fairfax. Pls.' Ex. 2094 at 45, 58.

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[32] The district that was enacted as House District 7 was labeled as district 23 on the House VRA map. Joint Ex. 1002 at 1.

Additionally, there is evidence that House District 7 divides political and geographic boundaries in order to gather a sufficient number of African-American voters to reach the 50%-plus-one goal. First, Nash and Franklin Counties are divided between House District 7 and House District 25. House District 25 has a BVAP of only 16.05%, compared to House District 7's BVAP of 50.67%. Joint Ex. 1004 at 147. Further, House District 7 divides seven municipalities. *Id.* at 124. Most notably, 61.78% of the population of Rocky Mount was assigned to House District 7, but the lines were drawn such that the district managed to capture almost all of the city's voting-age African-American population in Nash County: 96.16%. Third Joint Stip. ¶ 174; Joint Ex. 1004 at 124. Likewise, House District 7 includes only 38.93% of the population of the city of Dortches, but 70.65% of that city's black voting-age population. Third Joint Stip. ¶ 173; Joint Ex. 1004 at 124. Finally, House District 7 includes 48.18% of the city of Spring Hope, but 76.63% of the voting-age African-Americans in that city. Third Joint Stip. ¶ 175; Joint Ex. 1004 at 124.

The enacted district also divides twenty-two of the thirty-two precincts comprising the district. Third Joint Stip. ¶ 170; Joint Ex. 1004 at 6; Trial Tr. vol. II, 14:14-18 (Bryant). In other words, nearly 69% of the precincts included in the district were split. Of the voting-age African-Americans residing in the twenty-two split precincts, 83.1% were assigned to House District 7, and the remainder were assigned to the majority-white House District 25. Third Joint Stip. ¶ 171; Joint Ex. 1004 at 1, 147. The racial density map also indicates that race explains the

placement of the unusual boundaries for this district. Third Joint Stip. ¶ 185.

Senator Bryant testified that the benchmark district was connected through Interstate 95 and U.S. Route 301, but enacted House District 7 does not even have a major road connecting the portions in Franklin County to the portions in Nash County. Trial Tr. vol. II, 15:8-10; *see Karcher*, 462 U.S. at 757 n.20 (Stevens, J., concurring) (noting that even oddly shaped districts may be compact from a "sociopolitical" standpoint if, for instance, the district follows a "major transport corridor"). In fact, she and her volunteers attempted to drive the district "to figure out where the boundaries are" and found that it was "virtually impossible." Trial Tr. vol. II, 15:13-16, 18:17-20 (Bryant). According to Senator Bryant, a driver on Highway 64, which is a major corridor through that portion of the state, would cross in and out of House District 7 roughly "five times." *Id.* at 18:3-7. Unsurprisingly, the bizarre boundaries of enacted House District 7 have caused significant voter confusion. *Id.* at 17:17-23.

The circumstantial evidence strongly suggests that race was the predominant motivation for drawing the enacted district. But even if the circumstantial evidence were less clear, the direct evidence of legislative intent removes any doubt. At trial, Representative Lewis testified that race explains the line dividing House Districts 7 and 25. Trial Tr. vol. III, 217:25-218:4. Plus, Dr. Hofeller noted that House District 7 would have violated the WCP if it were not a VRA district because it included a "double traverse of the boundary between Franklin

and Nash Counties." Defs.' Ex. 3028 at 14. Once again, this illustrates that the WCP, along with other traditional districting criteria, was subordinated to race in drawing this district. *Id.*; *see also* Defs.' Proposed Findings of Fact and Conclusions of Law at 60 ("Defs.' Post-trial Findings"), ECF No. 118.

In conclusion, the direct and circumstantial district-specific evidence, in addition to the statewide evidence, confirms that race predominated in drawing House District 7.

11. House District 12

Enacted House District 12 is a majority-black district located in Greene, Lenoir, and Craven Counties. The benchmark version of House District 12 had a BVAP of 47.51% under the 2000 census and 46.45% under the 2010 census. Third Joint Stip. ¶ 187. Enacted House District 12 has a BVAP of 50.60%, thus achieving the Redistricting Chairs' goal of increasing the BVAP above 50%. *Id.* ¶ 188; Joint Ex. 1004 at 147. The Chairs identified House District 12 as an intended VRA district on the House VRA map, and the district was enacted without substantial changes to the shape, location, or BVAP of the proposed VRA district. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1; Pls.' Ex. 2072 at 11.

House District 12 is long and skinny, and visually stands out as one of the least compact districts in the state. The enacted district has a Reock score of 0.12.[33] Pls.' Ex. 2094 at 58. This is the

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[33] The Reock score is one of the most "widely used" compactness measures. Pls.' Ex. 2093 at 3-4; *see also Karcher*, 462 U.S. at 756, 756 n.19 (Stevens, J., concurring) (citing the Reock

lowest, and thus worst, Reock score of any district in the Enacted Plan, or in the Benchmark Plan. Pls.' Ex. 2093 at 33-38. This score is also significantly lower than the average Reock score for the Enacted House Plan, which is 0.38. *Id.* at 35. Enacted House District 12 is less compact than the benchmark on six of eight measures presented by Mr. Fairfax, and ties the benchmark on a seventh measure. Pls.' Ex. 2094 at 45, 58.

In Craven County, enacted House District 12 is almost non-contiguous at certain points. The district is connected by the narrowest of land bridges along Craven County's western border. Pls.' Ex. 2022 at 3; *see Miller*, 515 U.S. at 908, 920 (holding that race predominated in drawing a district which contained narrow "land bridges" through unpopulated areas to connect African-American populations).

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measure, among others, as a way to mathematically calculate compactness). While there is no particular score that divides compact from non-compact districts, Mr. Fairfax testified that some scholars believe scores under 0.19 or 0.30 indicate that the district "should be reevaluated." Trial Tr. vol. I, 181:18-182:8. Defendants suggest we rely on *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 415-16, 421 (E.D.N.C. 2000), *rev'd* 532 U.S. 234 (2001), which said that 0.15 constitutes a "low" Reock score, and which held that race predominated in drawing a district with a Reock score of 0.31. *See, e.g.*, Defs.' Post-trial Findings at 49, 69, 73-74. The Supreme Court reversed the *Cromartie* district court decision, finding that politics and not race was the predominant factor in drawing the district, but it did not cite or mention Reock scores in its decision. *Cromartie II*, 532 U.S. 234. Based on the variety of numbers suggested by the parties, we cannot discern any clear indicator of what is a compact "enough" Reock score. But we note that House District 12's Reock score of 0.12 is below every suggested threshold.

House District 12 divides three counties and four municipalities, seemingly on the basis of race. Joint Ex. 1004 at 1, 125. For example, House District 12 contains 42.49% of the population of the city of New Bern, but 72.70% of New Bern's African-American voting-age population. Third Joint Stip. ¶ 193; Joint Ex. 1004 at 125. It also includes 81.99% of the city of Kinston, but 92.72% of the voting-age African-American population in that city. Third Joint Stip. ¶ 192; Joint Ex. 1004 at 125. House District 12 contains thirteen whole precincts, and thirty-four split precincts. Third Joint Stip. ¶ 190; Joint Ex. 1004 at 8-9. In other words, over 72% of the precincts in the district are split. Of those living in the split precincts, 65.99% of the voting-age African-Americans are assigned to House District 12. Third Joint Stip. ¶ 191.

The racial density map similarly suggests that some of the more bizarre portions of the district were drawn to capture areas with a high proportion of African-Americans. *Id.* ¶ 203. Plaintiff Julian Pridgen, a resident of Lenoir County, testified that particular neighborhoods and communities with high concentrations of African-American voters were drawn into House District 12. Trial Tr. vol. I, 204:25-205:1, 212:12-23. For instance, a narrow protrusion in the northeastern corner of Lenoir County reaches out to grab the town of Grifton, which Mr. Pridgen stated is predominantly African-American. *Id.* at 212:18-213:5.

Finally, Defendants' own statements support our conclusion that race predominated in drawing House District 12. In the state's Section 5 preclearance

filings, the state explained that the changes it made to the benchmark version of House District 12, such as adding additional areas in Greene and Lenoir Counties, "restored" House District 12 to "majority black status." Joint Ex. 1024 at 15. Additionally, Defendants assert that the reason enacted House District 12 is less compact than some of the alternative proposed versions of the district is because "[n]one of the alternate versions of [House District] 12 were created with a majority black [voting-age population]." Defs.' Post-trial Findings at 131. These statements reinforce our conclusion that it is race, and not any of the traditional redistricting criteria, that explains why House District 12 is one of the least compact districts in the state.

Viewed in conjunction with the statewide evidence, the district-specific evidence confirms that race predominated in drawing House District 12.

12. House District 21

House District 21 is a majority-black district containing portions of Sampson, Duplin, and Wayne Counties. The benchmark version of House District 21 had a BVAP of 48.35% under the 2000 census and 46.25% under the 2010 census. Third Joint Stip. ¶ 205. Enacted House District 21 has a BVAP of 51.90%, thus meeting the Redistricting Chairs' 50%-plus-one target. *Id.* ¶ 206; Joint Ex. 1004 at 147.

In Dr. Hofeller's initial study of the state's demographics, he determined that a majority-black district could be drawn in this area of the state, and proceeded to do so. Defs.' Ex. 3028 at 8. The Chairs identified House District 21 as a proposed VRA district on the House VRA map. Joint Ex. 1002 at 1.

The proposed version of the district contained a portion in Pender County, which was later removed and replaced with a portion in Duplin County prior to the enactment of the final House map. *Id.*; Joint Ex. 1004 at 1. The only explanation put forth by the Redistricting Chairs for the addition of Duplin County is that it allowed them to "reach[] the threshold of getting above the 50 percent mark." Joint Ex. 1018 at 31 (July 21, 2011, House Redistricting Committee Meeting Transcript) (Lewis); *see also* Joint Ex. 1024 at 15-16 (House 2011 Section 5 Submission) ("[S]ignificant portions of Duplin County have been added to this district to restore its majority black status and to add population.").

House District 21 contains the entire eastern edge of Sampson County, a substantial portion of western Duplin County, and a narrow appendage that reaches north into Wayne County, capturing parts of the city of Goldsboro. Joint Ex. 1004 at 1; *see* Trial Tr. vol. II, 152:6-15 (Albert Kirby). Albert Kirby, a County Commissioner in Sampson County, testified that the enacted district "looks like an animal eating something." *Id.* at 142:1-4, 143:23-24. Based on our own assessment, the enacted district is visually less compact than the benchmark district. *See* Pls.' Ex. 2022 at 4. It is also less compact on six of the eight compactness measures presented by Mr. Fairfax. Pls.' Ex. 2094 at 45, 58. The Reock score for House District 21 is 0.19, which is the fourth-lowest score in the state and significantly worse than the Enacted House Plan's district average of 0.38. Pls.' Ex. 2093 at 35; Pls.' Ex. 2094 at 43-44, 58.

Enacted House District 21 splits all three of the counties it crosses through. The part of Duplin County in House District 21 has a BVAP of 45.75%, whereas the part of Duplin County excluded from the district has a BVAP of only 15.13%. Answer ¶ 170. In Sampson County, the portion in House District 21 has a BVAP of 53.71%, while the remainder of the county has a BVAP of 21.28%. Answer ¶ 173. Similarly, the BVAP of the part of Wayne County in House District 21 is 54.08%, while the portion of the county in adjacent House District 4 is 16.91%. *Id.* 176.

House District 21 also divides seven municipalities and twenty-five precincts. Third Joint Stip. ¶ 208; Joint Ex. 1004 at 127. The demographic data suggests that these divisions were motivated by race. For example, 81.40% of the population of the city of Goldsboro is included in House District 21, but that portion of Goldsboro includes 92.10% of the city's African-American voting-age population. Third Joint Stip. ¶ 211; Joint Ex. 1004 at 127. House District 21 also includes 46.15% of the city of Clinton, but manages to grab 72.67% of the voting-age African-American population in that city. Third Joint Stip. ¶ 210; Joint Ex. 1004 at 127. And in the twenty-five split precincts, 60.6% of the African-American voting-age population is assigned to House District 21. Third Joint Stip. ¶ 209.

Finally, the racial density map also indicates that areas with a high proportion of African-American voting-age population are enveloped by the protrusions and contours of House District 21. Third Joint Stip. ¶ 222. Consistent with the racial density

map, Albert Kirby testified that even "small neighborhoods" in his hometown of Clinton were "carved" into House District 21 if they were predominantly black, but assigned to neighboring House District 22 if they were predominantly white. Trial Tr. vol. II, 145:14-146:17.

In conclusion, when viewed in conjunction with the statewide evidence, the district-specific evidence confirms that race was the predominant motive for drawing House District 21.

13. House District 24

Enacted House District 24 is a majority-black district in Wilson and Pitt Counties. The benchmark version of House District 24 had a BVAP of 54.76% under the 2000 census and 56.07% under the 2010 census. Third Joint Stip. ¶ 224. Enacted House District 24 has a BVAP of 57.33%, thus achieving the Redistricting Chairs' goal of drawing the intended VRA districts above 50% BVAP. *Id.* ¶ 225; Joint Ex. 1004 at 147.

Enacted House District 24 overlaps substantially with two of the proposed VRA districts identified on the House VRA map, both of which had a BVAP above 50%.[34] Joint Ex. 1002 at 1, 99; Pls.' Ex. 2072 at 13. One of these proposed VRA districts included Martin County, roughly half of Edgecombe County, and a portion of Wilson County. Joint Ex. 1002 at 1. The other proposed district was primarily in Pitt County, but reached into a small portion of Beaufort County. *Id.* After the release of the House VRA map,

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[34] These two districts were labeled districts 8 and 9 on the House VRA map. Joint Ex. 1002 at 1.

the locations of these two intended VRA districts were adjusted, but both districts retained a BVAP above 50%. Joint Ex. 1004 at 1, 147. One was House District 24, and the other was House District 23—a majority-black district containing the entirety of Martin and Edgecombe Counties, and therefore forming a single-district, two-county group. *Id.* Thus, despite the changes to the map, the legislature still enacted two majority-black districts in this area of the state.

Enacted House District 24 is less visually compact than the benchmark district. Pls.' Ex. 2022 at 5. The district connects portions of two cities: Wilson on the western edge of the district and Greenville on the eastern edge. Joint Ex. 1004 at 128. Between these two cities, House District 24 narrows to a small bridge of land connecting the part of the district in Wilson County with the part in Pitt County. Pls.' Ex. 2022 at 5. Additionally, the enacted district is less compact on all eight of the compactness measures presented by Mr. Fairfax. Pls.' Ex. 2094 at 45, 58.

House District 24 divides twelve precincts and two municipalities. Third Joint Stip. ¶ 227; Joint Ex. 1004 at 128. For instance, the district contains 51.94% of the city of Wilson, but manages to include 74.43% of Wilson's black voting-age population. Third Joint Stip. ¶ 230; Joint Ex. 1004 at 128. The enacted district also contains 41.12% of the city of Greenville, and 58.28% of the city's black voting-age population. Third Joint Stip. ¶ 229; Joint Ex. 1004 at 128.

Further, Dr. Hofeller explained that if there was not a VRA district located in this county grouping,

the WCP would have required Wilson County to stand alone as its own single-county district. Defs.' Ex. 3028 at 13 ("Wilson County has the correct population to form a single house district entirely within its borders."); *see* Joint Ex. 1052 at 3 (indicating that under the 2010 census, Wilson County deviated from the ideal House district population by roughly two percent). However, Dr. Hofeller identified the problem with this plan: Wilson County had a BVAP of only 38.19%. Defs.' Ex. 3028 at 13. Thus, creation of such a single-county district would have required deviating from the goal of drawing 50%-plus-one districts. *Id.* Consistent with the statewide approach, when the 50%-plus-one target conflicted with the WCP, the WCP principles gave way. Dr. Hofeller therefore drew House District 24 in a two-county grouping and created a double traverse of the border between Pitt and Wilson Counties. *Id.* As Dr. Hofeller recognized, both changes were "departures from the strict *Stephenson* county-grouping criteria." *Id.* Thus, it was the racial target, and not the WCP, that dictated the contours and location of House District 24.

In conclusion, when viewed in light of the strong statewide evidence, the district-specific evidence confirms that race predominated in drawing House District 24.

14. House Districts 29 and 31

Enacted House Districts 29 and 31 are two majority-black districts in Durham County. Under the Benchmark Plan, Durham County was paired with Person County in a two-county group containing four districts, all of which had a BVAP below 50%.

Defs.' Ex. 3001 at 315-16, 326, 332-33. Benchmark House District 29 had a BVAP of 44.71% under the 2000 census and 39.99% under the 2010 census. Third Joint Stip. ¶ 242. Benchmark House District 31 had a BVAP of 44.71% under the 2000 census and 47.23% under the 2010 census. *Id.* ¶ 260. In the Enacted Plan, which paired Durham with Orange County, both House Districts 29 and 31 are majority-black districts located entirely within Durham County, with BVAPs of 51.34% and 51.81%, respectively. *Id.* ¶¶ 243, 261; Joint Ex. 1004 at 1, 147. Thus, the Chairs achieved their goal of drawing both of these districts at 50%-plus-one BVAP.

In Dr. Hofeller's initial study of the state's demographics, he determined that two majority-black district could be drawn in Durham County, and proceeded to do so. Defs.' Ex. 3028 at 9. House Districts 29 and 31 were identified as proposed VRA districts on the House VRA map, and were enacted without substantial changes to the location, shape, or BVAP of the proposed districts. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147; Pls.' Ex. 2072 at 14, 15.[35]

Enacted House Districts 29 and 31 both became visually less compact than their corresponding benchmark districts. While the benchmark districts followed county lines for significant stretches, the enacted districts' boundaries do not appear to follow county, or even precinct, lines. *See* Pls.' Ex. 2022 at 6-7. However, both are relatively small districts in the

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[35] On the House VRA map, the district that became House District 29 was labeled as district 31, and the district that became House District 31 was labeled as district 30. Joint Ex. 1002 at 1.

the WCP would have required Wilson County to stand alone as its own single-county district. Defs.' Ex. 3028 at 13 ("Wilson County has the correct population to form a single house district entirely within its borders."); *see* Joint Ex. 1052 at 3 (indicating that under the 2010 census, Wilson County deviated from the ideal House district population by roughly two percent). However, Dr. Hofeller identified the problem with this plan: Wilson County had a BVAP of only 38.19%. Defs.' Ex. 3028 at 13. Thus, creation of such a single-county district would have required deviating from the goal of drawing 50%-plus-one districts. *Id.* Consistent with the statewide approach, when the 50%-plus-one target conflicted with the WCP, the WCP principles gave way. Dr. Hofeller therefore drew House District 24 in a two-county grouping and created a double traverse of the border between Pitt and Wilson Counties. *Id.* As Dr. Hofeller recognized, both changes were "departures from the strict *Stephenson* county-grouping criteria." *Id.* Thus, it was the racial target, and not the WCP, that dictated the contours and location of House District 24.

In conclusion, when viewed in light of the strong statewide evidence, the district-specific evidence confirms that race predominated in drawing House District 24.

14. House Districts 29 and 31

Enacted House Districts 29 and 31 are two majority-black districts in Durham County. Under the Benchmark Plan, Durham County was paired with Person County in a two-county group containing four districts, all of which had a BVAP below 50%.

Defs.' Ex. 3001 at 315-16, 326, 332-33. Benchmark House District 29 had a BVAP of 44.71% under the 2000 census and 39.99% under the 2010 census. Third Joint Stip. ¶ 242. Benchmark House District 31 had a BVAP of 44.71% under the 2000 census and 47.23% under the 2010 census. *Id.* ¶ 260. In the Enacted Plan, which paired Durham with Orange County, both House Districts 29 and 31 are majority-black districts located entirely within Durham County, with BVAPs of 51.34% and 51.81%, respectively. *Id.* ¶¶ 243, 261; Joint Ex. 1004 at 1, 147. Thus, the Chairs achieved their goal of drawing both of these districts at 50%-plus-one BVAP.

In Dr. Hofeller's initial study of the state's demographics, he determined that two majority-black district could be drawn in Durham County, and proceeded to do so. Defs.' Ex. 3028 at 9. House Districts 29 and 31 were identified as proposed VRA districts on the House VRA map, and were enacted without substantial changes to the location, shape, or BVAP of the proposed districts. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147; Pls.' Ex. 2072 at 14, 15.[35]

Enacted House Districts 29 and 31 both became visually less compact than their corresponding benchmark districts. While the benchmark districts followed county lines for significant stretches, the enacted districts' boundaries do not appear to follow county, or even precinct, lines. *See* Pls.' Ex. 2022 at 6-7. However, both are relatively small districts in the

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[35] On the House VRA map, the district that became House District 29 was labeled as district 31, and the district that became House District 31 was labeled as district 30. Joint Ex. 1002 at 1.

urban area surrounding the city of Durham, and thus they are more compact than many of the other challenged districts. House District 29 was less compact on four of the eight compactness measures presented by Mr. Fairfax, and House District 31 was less compact on five of the eight compactness measures. Pls.' Ex. 2094 at 45, 58. As noted previously, even if a district is not egregiously non-compact, race can still be the predominant factor in its creation. *See Shaw II*, 517 U.S. at 907 (noting that evidence suggesting some traditional districting criteria were "addressed" does not foreclose the conclusion that race predominated); *Miller*, 515 U.S. at 912—13 (holding that race can still be the predominant motive in a compact district).

The evidence suggests that Durham County and the city of Durham were divided along racial lines to form these two majority-black districts. The other districts containing portions of the city of Durham—House Districts 30 and 50—have BVAPs of 18.43% and 13.25%, respectively. Joint Ex. 1004 at 108, 147. House Districts 29 and 31 contain 35.02% and 30.58% of the population of the city of Durham, respectively, but together capture 82.81% of Durham's black voting-age population. Third Joint Stip. ¶ 248; Joint Ex. 1004 at 108.

The benchmark versions of House Districts 29 and 31 each split only one precinct. Third Joint Stip. ¶¶ 245, 263. In contrast, the Enacted House Plan splits fourteen of the twenty-eight precincts that make up House District 29, and thirteen of the twenty-one precincts that make up House District 31. *Id.*; Joint Ex. 1004 at 18-19. In total, the Enacted

Plan splits twenty-one precincts in Durham County. Third Joint Stip. ¶ 247. Of the voting-age African-Americans residing in those twenty-one split precincts, 75% were assigned to either House District 29 or 31. *Id.*

At trial, Representative Larry Hall, who represents House District 29, testified that many of these precincts are split along racial lines. Trial Tr. vol. II, 177:19-179:4, 189:14-193:13. For instance, Precinct 53-1 in the southwest corner of House District 29 is divided so that the "predominantly white" population in the southern part of the precinct is cut out of the district, and the "predominantly black" section in the northern part of the precinct is kept in the district. *Id.* at 190:3-19. This dividing line becomes more irregular at one point, jutting out to grab one particular "densely populated African-American community." *Id.* at 189:25-191:12; *see also id.* at 188:11-189:24 (discussing how race explains the split in Precinct 35); *id.* at 191:13-192:16 (same for Precinct 6); *id.* at 192:17-193:13 (same for Precinct 33); *id.* at 195:13-23 (same for Precinct 30-1 in House District 31). The racial density maps confirm this testimony, showing that district lines were drawn so as to keep areas with a high proportion of African-Americans in House Districts 29 and 31, and assign areas without a high proportion of African-Americans to the majority-white districts. Third Joint Stip. ¶¶ 258, 275.

When viewed in conjunction with the statewide evidence, the district-specific evidence supports a finding that race predominated in drawing House Districts 29 and 31.

15. House District 32

Enacted House District 32 is a majority-black district along the border between North Carolina and Virginia. The benchmark version of House District 32 had a BVAP of 36.22% under the 2000 census and 35.88% under the 2010 census. Third Joint Stip. ¶ 277. As enacted in 2011, House District 32 has a BVAP of 50.45%, thus achieving the Chairs' 50%-plus-one goal. *Id.* ¶ 278; Joint Ex. 1004 at 147. The Chairs identified House District 32 as an intended VRA district on the House VRA map, and the district was enacted without substantial changes to the shape, location, or BVAP of the proposed VRA district.[36] Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147; Pls.' Ex. 2072 at 16.

House District 32 contains the entirety of Warren and Vance Counties, but splits Granville County. Joint Ex. 1004 at 1. The part of the district in Granville County includes a rectangle-shaped portion along the northern boundary of the county, and a more unusual, oddly shaped portion that extends south toward the center of Granville County, encompassing parts of the city of Oxford. Benchmark House District 32, on the other hand, included all of Granville County, and roughly half of Vance County. Defs.' Ex. 3001 at 326. Enacted House District 32 is visually less compact than the benchmark, particularly in Granville County, Pls.' Ex. 2022 at 8, and is less compact than the benchmark on six of the

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[36] On the House VRA map, the district that corresponds to enacted House District 32 was labeled district 27. Joint Ex. 1002 at 1.

eight compactness measures calculated by Mr. Fairfax, Pls.' Ex. 2094 at 45, 58.

House District 32 splits five of the nine precincts in Granville County that are included in that district. Joint Ex. 1004 at 19. In contrast, the benchmark district did not divide any precincts. Third Joint Stip. ¶ 280. In the five split precincts, 82% of the voting-age African-Americans were assigned to House District 32. *Id.* ¶ 281. The enacted district also divides the city of Oxford, seemingly on the basis of race. House District 32 contains 77.49% of the city of Oxford, but manages to capture 92.92% of the African-American voting-age population in that city. *Id.* ¶ 282; Joint Ex. 1004 at 129. This demonstrates that Defendants split political subdivisions in order to accomplish their 50%-plus-one goal.

Finally, the racial density map suggests that the district boundary in Granville County, particularly near the city of Oxford, was drawn to capture areas with a high proportion of African-American voters. Third Joint Stip. ¶ 287.

We acknowledge that the part of House District 32 in Warren and Vance Counties does not contain these same irregularities. But even if other criteria—such as keeping counties and precincts whole—may explain some of the district's boundaries, race still may predominate when a state has "mixed motive[s]" in drawing a district. *Vera*, 517 U.S. at 959; *see also Shaw II*, 517 U.S. at 907 ("That the legislature addressed [some race-neutral] interests does not in any way refute the fact that race was the legislature's predominant consideration."). The district-specific evidence indicates that traditional

districting criteria—such as compactness, respect for traditional and political boundaries, and maintaining communities of interest—were compromised in the Granville County portion of this district. When viewed in conjunction with the strong statewide evidence, the fact that the Chairs increased the BVAP of House District 32 by roughly fifteen percent in order to meet their 50%-plus-one goal leads us to conclude that race was the predominant factor in drawing this district.

16. House Districts 33 and 38

Enacted House Districts 33 and 38 are two majority-black districts located entirely within Wake County. Under the Benchmark Plan, Wake County included only one district with a BVAP above 40%. Third Joint Stip. ¶ 447. Based on the 2010 census, Wake County had sufficient population to contain eleven complete districts. Answer ¶ 206. In Dr. Hofeller's initial study of the state's demographics, he determined that it was possible to draw two of these Wake County districts above 50% BVAP, and he did just that: enacted House District 33 has a BVAP of 51.42% and enacted House District 38 has a BVAP of 51.37%. Third Joint Stip. ¶¶ 288, 303; Joint Ex. 1004 at 147. The Chairs identified House Districts 33 and 38 as proposed VRA districts on the House VRA map and enacted those districts without substantial modification to their location, shape, or BVAP. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147; Pls.' Ex. 2072 at 17-18.[37]

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[37] On the House VRA map, what became enacted House District 33 is labeled district 38, and the area that became enacted House District 38 is labeled district 33. Joint Ex. 1002 at 1.

Benchmark House District 33, which was in roughly the same location as enacted House District 38, was initially drawn with a BVAP of 49.97% based on the 2000 census, but increased to a BVAP of 51.74% by the 2010 census. Defs.' Ex. 3001 at 315, 326, 332. Benchmark House District 38, which now forms part of enacted House District 33, had a BVAP of only 31.63% under the 2000 census and 27.96% under the 2010 census. *Id.* The remainder of enacted House District 33 overlaps with several other benchmark districts, none of which had a BVAP above 35%. Pls.' Ex. 2022 at 9-10; Defs.' Ex. 3001 at 315, 326, 332.

Visually, House Districts 33 and 38 became marginally less compact than the corresponding benchmark districts. Pls.' Ex. 2022 at 9-10. Both are located in the urban area surrounding Raleigh, North Carolina, and thus did not have to be as sprawling as more rural districts to meet Defendants' population requirements. House District 33 is less compact on six of the eight compactness measures presented by Mr. Fairfax, and House District 38 is less compact on five. Pls.' Ex. 2094 at 45, 58. The relative compactness of these districts does not, however, preclude a finding that race predominated. *See Miller*, 515 U.S. at 913 ("[P]arties may rely on evidence other than bizarreness to establish race-based districting.").

The evidence suggests that the Enacted Plan divides Wake County on the basis of race. First, other than House Districts 33 and 38, no Wake County House districts have a BVAP higher than 27%. Answer ¶ 207; Joint Ex. 1004 at 147. Additionally,

House Districts 33 and 38 each split more than half of their precincts. Third Joint Stip. ¶¶ 289, 305; Joint Ex. 1004 at 20, 22. Both of the districts capture roughly 65% of the African-American voting-age population in the precincts that they split. Third Joint Stip. ¶¶ 290, 306.

The two districts also appear to divide municipalities and communities of interest on the basis of race. House Districts 33 and 38, combined, contain 36.28% of the city of Raleigh, but manage to include 66.81% of Raleigh's voting-age African-American population. Third Joint Stip. ¶ 307; Joint Ex. 1004 at 116. In addition to Raleigh, these two districts divide the towns of Knightdale and Garner as well as several neighborhoods. Joint Ex. 1004 at 129-30. For instance, the historic Raleigh neighborhoods of Oakwood and Mordecai in Precinct 14 appear to have been divided on the basis of race. *See* Joint Ex. 1004 at 20, 22 (showing that the portion of Precinct 14 in House District 34 has a BVAP of less than 19%, while the portions in House Districts 33 and 38 have BVAPs of 41.29% and 33.98%, respectively); Pls.' Ex. 2104 at 2-3 (Aff. of Hugh Stohler in *Dickson v. Rucho*). The General Assembly also received information that eastern Wake County, which is split by the Enacted Plan, forms a community of interest. Joint Ex. 1018 at 33; Joint Ex. 1020 at 132-35.

Finally, the racial density map indicates that the district boundaries were drawn, in many places, to capture areas with a high proportion of voting-age African-Americans. Third Joint Stip. ¶¶ 300, 312.

When viewed in light of the strong statewide evidence, it is clear that Defendants drew the district boundaries in Wake County with the primary goal of creating two majority-black districts. The district-specific evidence supports our finding that race predominated in drawing House Districts 33 and 38.

17. House Districts 42 and 43

Enacted House Districts 42 and 43 are both majority-black districts located entirely within Cumberland County. Under the Benchmark Plan when drawn, Cumberland County did not contain any majority-black districts. Defs.' Ex. 3001 at 308, 315.

Benchmark House District 42 had a BVAP of 45.11% under the 2000 census and 47.94% under the 2010 census. Third Joint Stip. ¶ 314. Enacted House District 42 has a BVAP of 52.56%, thus meeting the Chairs' stated goal of drawing VRA districts above 50% BVAP. *Id.* ¶ 315. Benchmark House District 42 was underpopulated by 11,017 persons, according to the 2010 census. To remedy this, enacted House District 42—which was located in roughly the same location as its predecessor—contains 137 *fewer* white persons and 9,681 *more* African-Americans than the benchmark. *Id.* ¶ 316; Pls.' Ex. 2022 at 11.

House District 43 follows a somewhat different pattern, because although the benchmark was drawn with a BVAP of 48.69% based on the 2000 census, its BVAP had increased to 54.69% under the 2010 census. Third Joint Stip. ¶ 331. Therefore, the benchmark district already contained a sufficient black population to satisfy the Chairs' 50%-plus-one goal. The challenge for Defendants was to keep the

district's BVAP above 50% even as they simultaneously increased the BVAP in neighboring House District 42 (all while adding population as necessary to meet the one person, one vote standard).[38] Defendants accomplished that goal, drawing House District 43 with a BVAP of 51.45% while still creating a second majority-black district in Cumberland County. *Id.* ¶ 332; Joint Ex. 1004 at 147.

In Dr. Hofeller's initial study of the state's demographics, he determined that two majority-black district could be drawn in this area of the state, and proceeded to do so. Defs.' Ex. 3028 at 9. House Districts 42 and 43 were both identified as proposed VRA districts on the House VRA map, and were enacted without substantial modification to the location, shape, or BVAP of the proposed districts. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147; Pls.' Ex. 2072 at 19-20.

While both districts contain a few odd appendages, House Districts 42 and 43 are relatively compact compared to many of the other challenged districts. House District 42 is less compact when compared to the benchmark on five of the eight compactness measures presented by Mr. Fairfax. Pls.' Ex. 2094 at 45, 58. House District 43 is more compact than the benchmark on five of the eight measures. *Id.* But as stated previously, there is no requirement "that a district must be bizarre on its face before there is a constitutional violation." *Miller*, 515 U.S. at 912.

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[38] House District 43 was underpopulated by 28,637 persons according to the 2010 census. Third Joint Stip. ¶ 333.

The evidence suggests that race was the predominant factor determining the contours of the enacted district. The most notable change in the shape of House District 42 is the removal of a large portion of the benchmark district in its northeastern corner. Pls.' Ex. 2022 at 11. This area contains Fort Bragg, an Army base. Trial Tr. vol. II, 104:1-24 (Covington). The state explained in its Section 5 preclearance filing that House District 42 was established as a majority-black district, and "[t]his was accomplished" by removing Fort Bragg, which would otherwise "dilute the minority voting strength of African-American voters in Cumberland County." Joint Ex. 1024 at 16. In other words, removing Fort Bragg from the district allowed the General Assembly to enact House District 42 as a majority-black district.

The evidence further suggests that enacted House Districts 42 and 43 divide precincts and communities on the basis of race. House District 42 splits fifteen of its nineteen precincts. Third Joint Stip. ¶ 317; Joint Ex. 1004 at 23-24. House District 43 splits fifteen of the twenty-one precincts contained in that district. Third Joint Stip. ¶ 334; Joint Ex. 1004 at 24. Thus, House Districts 42 and 43 split 78.95% and 71.43% of their precincts, respectively. Roughly 67% of the voting-age African-Americans who reside in one of the split precincts in Cumberland County were assigned to either House District 42 or 43. Third Joint Stip. ¶ 335.

Since Fayetteville is a large city, it was necessarily split among multiple House districts. However, the evidence establishes that it was divided

on the basis of race. House Districts 42 and 43, combined, contain 63.52% of the city of Fayetteville, but manage to grab 80.37% of Fayetteville's voting-age African-American population. *Id.* ¶ 319; Joint Ex. 1004 at 109. Finally, the racial density maps indicate that many of the strange protrusions in the district reach out to capture areas with a high proportion of voting-age African-Americans. Third Joint Stip. ¶¶ 329, 345.

When viewed in light of the strong statewide evidence, it is clear that Defendants drew the district boundaries in Cumberland County with the primary goal of creating two majority-black districts. The district-specific evidence supports our finding that race predominated in drawing House Districts 42 and 43.

18. House District 48

Enacted House District 48 is a majority-black district along North Carolina's southern border. The benchmark version of House District 48 had a BVAP of 45.46% under the 2000 census and 45.56% under the 2010 census. Third Joint Stip. ¶ 347. Enacted House District 48 was drawn with a BVAP of 51.27%, thus achieving the Redistricting Chairs' goal of drawing each VRA district above 50% BVAP. *Id.* ¶ 348; Joint Ex. 1004 at 147.

In Dr. Hofeller's initial study of the state's demographics, he determined that a majority-black district could be drawn in this area of the state, and proceeded to do so. Defs.' Ex. 3028 at 8. The Chairs identified House District 48 as a proposed VRA district on the House VRA map, and the district was enacted without substantial changes to the shape,

location, or BVAP of the proposed district. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 147.

Enacted House District 48 is located in roughly the same location as the benchmark district, although it incorporates Richmond County, which was previously in House District 66. Defs.' Ex. 3001 at 326. Benchmark House District 48 was underpopulated by 13,018 persons according to the 2010 census. To remedy this, and increase the BVAP, the enacted district contains 12,908 more African-Americans and 6,751 more white people. Third Joint Stip. ¶ 349.

Visually, House District 48 is one of the most bizarre and sprawling districts in the Enacted House Plan. Joint Ex. 1004 at 1. The district is located in portions of Hoke, Robeson, Scotland, and Richmond Counties. The base of the district is a narrow strip of land along the border between North Carolina and South Carolina. *See* Trial Tr. vol. I, 78:18-23 (Blue) (describing portions of the base of the district as a "land bridge" between African-American populations). Three different arms reach north from this base: one that snakes through Robeson County, one that travels primarily through the eastern side of Scotland County before crossing into Hoke County and eventually veering into a small portion of Robeson County, and one that meanders erratically through Richmond County. House District 48 is significantly less visually compact than the benchmark district.[39]

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[39] House District 48 provides a useful example of how the numerical estimates of compactness do not always give an accurate portrayal of the district's shape. House District 48 is

Additionally, enacted House District 48 divides four counties and five municipalities. Joint Ex. 1004 at 1, 131. The evidence suggests that these divisions occurred largely along racial lines. Senator Dan Blue, who was born and reared in Robeson County, explained that "[t]here are ten [to] twelve towns in Robeson County, each having its own black population" and House District 48 "reaches most of them and sticks them into the district." Trial Tr. vol. I, 42:25, 79:4-6. For instance, House District 48 includes 60.06% of the city of Ellerbe, but captures 95.24% of that city's black voting-age population. Third Joint Stip. ¶ 352; Joint Ex. 1004 at 131. The district also includes 44.99% of the city of Hamlet, but manages to include 78.88% of the voting-age African-Americans in that city. Third Joint Stip. ¶ 354; Joint Ex. 1004 at 131. Similar patterns hold true for the cities of Laurinburg and Rockingham. Third Joint Stip. ¶¶ 355, 356; Joint Ex. 1004 at 131.

Further, House District 48 divides thirty-one precincts. Third Joint Stip. ¶ 350. The evidence suggests that the numerous precinct splits were motivated by race. Of the voting-age African-Americans residing in the district's split precincts, 77.9% are assigned to House District 48. *Id.* ¶ 351. This information is consistent with what the racial density suggests: many of the unusual borders of the

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less compact than its counterpart in the Benchmark Plan on four of the eight measures presented by Mr. Fairfax, and ties the benchmark on a fifth measure. Pls.' Ex. 2094 at 24, 43. While statistically it seems that the districts may be comparable, the appearances of the districts stand in sharp contrast.

district capture areas with high proportions of voting-age African-Americans. *Id.* ¶ 366.

Despite this evidence, Defendants assert that the boundaries for House District 48 had to be "stretched to a greater length" because the district had to include an above-average population. Defs.' Post-trial Findings at 138. The population in this district did have to be higher than average because it was placed in a twenty-county grouping that needed to include more populous districts in order to offset underpopulated districts elsewhere in the state. Trial Tr. vol. IV, 242:21-243:19 (Hofeller); Pls.' Ex. 2085. However, there were many ways to draw a regularly shaped district in this region that would have contained the requisite population; those alternatives simply would have required compromising on the 50%-plus-one target. Additionally, to the extent that the one person, one vote standard influenced the drawing of lines, we must follow the Supreme Court's instruction and view that as a background consideration that cannot negate the predominance of race in redistricting. *See supra* note 16.

Finally, Representative Lewis testified at trial that "[t]he shape of the lines in this particular VRA district" reflected an attempt to group together an African-American population. Trial Tr. vol. III, 221:13-18. In fact, he noted that the twenty-county group actually gave them more freedom to draw the district based on race, stating that "because the county grouping was so big, there was less of a restriction for how this particular . . . minority population could be grouped and drawn." *Id.* at 221:19-21.

In conclusion, the district-specific evidence provides abundant support for the finding that House District 48 was drawn to achieve the Chairs' statewide goal of drawing VRA districts at 50%-plus-one. We find that race predominated in drawing House District 48.

19. House Districts 57, 58, and 60

Enacted House Districts 57, 58, and 60 are majority-black districts located entirely within Guilford County. Under the Benchmark Plan, Guilford County had two majority-black districts. Defs.' Ex. 3001 at 316, 326, 333. During his initial review of the state's demographics under the 2010 census, Dr. Hofeller determined that it was possible to increase the number of majority-black districts in Guilford County to three, in accordance with the proportionality goal and 50%-plus-one target. Defs.' Ex. 3028 at 9. House Districts 57, 58, and 60, as enacted, have BVAPs of 50.69%, 51.11%, and 51.36%, respectively. Third Joint Stip. ¶¶ 369, 377, 389; Joint Ex. 1004 at 148. The Chairs identified these three districts as proposed VRA districts on the House VRA map, and they were enacted without any substantial modification to the proposed districts' location, shape, or BVAP. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 148; Pls.' Ex. 2072 at 21-23.[40]

It is challenging to compare these districts to their counterparts in the Benchmark Plan because the districts were moved and reshaped significantly in order to fit three majority-black districts in

[40] On the House VRA map, House Districts 57 and 58 are labeled districts 64 and 63. Joint Ex. 1002 at 1.

Guilford County. Joint Ex. 1004 at 1; Pls.' Ex. 2022 at 14-16; Defs.' Ex. 3001 at 326. For instance, House District 57 moved from the area west of downtown Greensboro to the northeastern portion of the city, with almost no discernable overlap. Pls.' Ex. 2022 at 14. Thus, it is most useful to look at Guilford County as a whole.

In the Benchmark Plan, House District 58 had a BVAP of 53.35% under the 2000 census and 53.43% under the 2010 census. Defs.' Ex. 3001 at 316, 333. House District 60 had a BVAP of 50.59% under the 2000 census and 54.36% under the 2010 census. *Id.* Of the remaining districts in Guilford County, the one with the highest BVAP was benchmark House District 59, which had a BVAP of 23.52% under the 2000 census, which grew to 30.15% under the 2010 census. *Id.* Benchmark House District 57 had a BVAP of 21.38% under the 2000 census and 29.93% under the 2010 census. *Id.* Therefore, increasing the BVAP in a third Guilford County district to 50%-plus-one required the Chairs to reconfigure all districts within the county, and actually reduce the BVAPs in House Districts 58 and 60 so that additional African-American communities could be added to enacted House District 57.

House Districts 57, 58, and 60 all became less visually compact when compared to the benchmark versions of those districts. However, they are all located in or near the city of Greensboro, an urban area, and therefore are not as bizarrely shaped as many of the other challenged districts. *See Shaw II*, 517 U.S. at 907 (noting that evidence suggesting some traditional districting criteria were "addressed"

does not foreclose the conclusion that race predominated); *Miller*, 515 U.S. at 912—13 (explaining that race can still be the predominant motive in a compact district). Of the three, House District 60 is the most bizarre on its face. House District 60 contains two substantial portions: one that captures the southwestern portion of Greensboro and one that captures part of the population of High Point. Joint Ex. 1004 at 133; Pls.' Ex. 2022 at 16. These two poles are connected by a narrow land bridge made entirely of split precincts. Pls.' Ex. 2022 at 16. That land bridge is made up almost completely of census blocks with less than 20% BVAP, which probably explains its narrowness. *See* Third Joint Stip. ¶¶ 376, 399 (racial density maps). On the eight compactness measures presented by Mr. Fairfax, House Districts 57, 58, and 60 are less compact than the benchmark districts on eight, six, and four[41] of the measures, respectively. Pls.' Ex. 2094 at 24, 43.

Because of the size of the city of Greensboro, it necessarily had to be divided among multiple house districts, Joint Ex. 1004 at 110. However, the evidence suggests that the division of Greensboro was not race-neutral. House Districts 57, 58, and 60 together contain 70.67% of the city of Greensboro, but manage to capture 88.39% of Greensboro's African-American voting-age population. Third Joint Stip. ¶ 373; Joint Ex. 1004 at 110. The remainder of the voting-age African-Americans in Greensboro are split among three other districts. Third Joint Stip. ¶ 373.

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[41] House District 60 tied the benchmark on a fifth measure. Pls.' Ex. 2094 at 24, 43.

Additionally, House Districts 57, 58, and 60 divide fifteen, fifteen, and sixteen precincts, respectively. *Id.* ¶¶ 371, 378; Joint Ex. 1004 at 30-33. Of the total number of split precincts in Guilford County, 77.7% of the voting-age African-Americans who live in those split precincts were assigned to House Districts 57, 58, and 60, as opposed to the other three districts. Third Joint Stip. ¶ 372. This data suggests that precincts were split on the basis of race.

The racial density maps also indicate that the boundaries of these districts were drawn on the basis of race. Third Joint Stip. ¶¶ 376, 399. For instance, the map of House District 60 clearly shows that the two poles of the district encompass areas with a high proportion of voting-age African Americans, in both High Point and Greensboro. *Id.* Additionally, Yvonne Johnson, a long-time elected official in the city of Greensboro, testified that the portion of House District 57 that stretches like a tail into the eastern part of the county encompasses the "predominantly black community" of Sedalia. Trial Tr. vol. I, 200:14-201:2. This assertion is supported by the racial density map. Third Joint Stip. ¶ 376.

Overall, when viewed in conjunction with the strong statewide evidence of legislative intent, the district-specific evidence confirms that race predominated in drawing House Districts 57, 58, and 60.

20. House Districts 99, 102, and 107

Enacted House Districts 99, 102, and 107 are all majority-black districts located entirely within Mecklenburg County. Under the Benchmark Plan,

Mecklenburg County contained only three districts with more than 40% BVAP, two of which were drawn above 50% BVAP. Third Joint Stip. ¶ 453; Defs.' Ex. 3001 at 316-17, 326. Of the twelve total districts drawn entirely within Mecklenburg County, the Enacted Plan contains five districts that exceed 50% BVAP. Third Joint Stip. ¶ 454; Joint Ex. 1004 at 1, 148-49. Three of those five districts—House Districts 99, 102, and 107—have been challenged in this case. Those three districts were drawn with BVAPs of 54.65%, 53.53%, and 52.52%, respectively. Joint Ex. 1004 at 148-49. The Chairs identified these three districts as proposed VRA districts on the House VRA map, and they were enacted without substantial modification to the proposed districts' location, shape, or BVAP. Joint Ex. 1002 at 1, 99; Joint Ex. 1004 at 1, 148-49; Pls.' Ex. 2072 at 24-26.[42]

Like in Guilford County, fitting additional majority-black districts in Mecklenburg County required the districts within the county to be significantly moved and reshaped. Therefore, the benchmark districts do not substantially correspond with the enacted districts. Pls.' Ex. 2022 at 17-19. Additionally, since the districts are located in the urban area surrounding the city of Charlotte, they are more visually compact than many of the other challenged districts. The least visually compact of these three is House District 107, which is shaped like an arch, and stretches from downtown Charlotte on one side to the border of Cabarrus County on the other. *Id.* at 19.

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[42] On the House VRA map, House Districts 99, 102, and 107 are labeled districts 82, 87, and 86, respectively. Joint Ex. 1002 at 1.

Of the eight compactness measures presented by Mr. Fairfax, House Districts 99, 102, and 107 are less compact than their corresponding benchmark districts on three, eight, and four of the measures, respectively. Pls.' Ex. 2094 at 24-25, 43-44. As noted previously, however, race can still predominate even in a relatively compact district. *See Shaw II*, 517 U.S. at 907 (noting that evidence suggesting some traditional districting criteria were "addressed" does not foreclose the conclusion that race predominated); *Miller*, 515 U.S. at 912—13 (explaining that race can still be the predominant motive in a compact district).

There are numerous indications that these districts were used to divide Mecklenburg County on the basis of race. The non-majority-black districts in Mecklenburg County have drastically lower BVAPs than the so-called VRA districts. *See* Answer ¶ 244. House District 88, for example, which shares its western boundary line with challenged House District 102, has a BVAP of only 7.94%. Joint Ex. 1004 at 1, 148. The boundary line between House Districts 102 and 88 includes split precincts, particularly in the northeastern portion of House District 102, which juts out irregularly from the rest of the district. Pls.' Ex. 2022 at 18. On the other side of House District 102 sits House District 92, which was enacted with a BVAP of 18.18%. Joint Ex. 1004 at 1, 148. Here again, the boundary—this time between House Districts 102 and 92—has several split precincts, and includes an irregular appendage in the southwestern corner of House District 102. Pls.' Ex. 2022 at 18. Similarly, the most irregular portion of the boundary for House District 99 is the

only portion that separates it from a majority-white district: House District 103, which has a BVAP of 13.07%. Joint Ex. 1004 at 1, 148. That boundary also contains a number of precinct splits. Pls.' Ex. 2022 at 17. House Districts 99, 102, and 107 divide seven, thirteen, and nine precincts, respectively. Third Joint Stip. ¶¶ 404, 419, 431.

Just as it racially divides Mecklenburg County, the Enacted House Plan also divides the city of Charlotte on the basis of race. The majority-black districts in Mecklenburg County, combined, contain 50.52% of Charlotte's population, but manage to include 76.93% of the voting-age African-Americans who reside in that city. *Id.* ¶ 406; Joint Ex. 1004 at 106. The remainder of the African-American population in Charlotte is split among seven other districts. Third Joint Stip. ¶ 406.

Finally, the racial density maps indicate that the boundaries which separate House Districts 99 and 102 from neighboring predominantly white districts appear to trace areas with high proportions of voting-age African-Americans.[43] *Id.* ¶ 414.

When viewed in conjunction with the statewide, direct evidence of racial predominance, the district-specific evidence confirms that Defendants drew five majority-black VRA districts in Mecklenburg County with the predominant goal of meeting their racial targets. And at least for House Districts 99, 102, and

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[43] The racial density map does not tell as clear of a story for House District 107, which mainly borders other majority-African-American districts. However, the totality of the evidence still supports a finding that race predominated in drawing that district.

107, the evidence suggests that traditional criteria were subordinated, where necessary, to meet this racial target. Therefore, we find that race predominated in drawing House Districts 99, 102, and 107.

* * *

In sum, we find that race was the predominant factor motivating the drawing of all challenged districts.

III. Voting Rights Act Compliance as a Possible Defense

"Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" *Shaw II*, 517 U.S. at 907 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Consequently, when race is the predominant factor motivating the creation of a district, that district "cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Miller*, 515 U.S. at 920. Thus, the burden now shifts to Defendants to demonstrate that the challenged districts are narrowly tailored to serve a compelling state interest. *Shaw II*, 517 U.S. at 908; *Miller*, 515 U.S. at 920.

Defendants assert two compelling state interests for their race-based districting: compliance with Sections 2 and 5 of the VRA. The Supreme Court has yet to decide whether compliance with the VRA is a compelling state interest. Instead, the Court has assumed as much for the purpose of its analysis. *See, e.g.*, *Vera*, 517 U.S. at 977 ("[W]e assume without

deciding that compliance with the results test [of Section 2 of the VRA] . . . can be a compelling state interest."); *Shaw II*, 517 U.S. at 911 (assuming but not deciding that VRA compliance can be a compelling interest). Thus, for the purpose of resolving this suit, we too assume, *arguendo*, that compliance with either Section 2 or Section 5 of the VRA can be a compelling state interest.[44]

However, even assuming such compelling interests, attempts at VRA compliance "cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application" of federal law. *Miller*, 515 U.S. at 921. Thus, to satisfy strict scrutiny, Defendants must show that they had a "strong basis in evidence" or "good reasons to believe" that each of the challenged districts, as drawn, were required to comply with the VRA. *Alabama*, 135 S. Ct. at 1274. Narrow tailoring also requires that each district be drawn in a manner that actually remedies the potential VRA violation. *Shaw II*, 517 U.S. at 916; *cf. Vera*, 517 U.S. at 979 ("[A] district drawn in order to satisfy [the VRA] must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid [VRA] liability."). We address Defendants' defenses with respect to Sections 2 and 5 of the VRA in turn.

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[44] Although North Carolina's counties are no longer covered by Section 5 following the Supreme Court's 2013 decision in *Shelby County*, 133 S. Ct. 2612, that does not foreclose the possibility that compliance with Section 5 was a compelling interest at the time of the 2011 redistricting. *See Alabama*, 135 S. Ct. at 1274; *Page*, 2015 WL 3604029, at *16.

A. Section 2 as a Compelling Interest

Defendants principally argue that their predominant use of race was justified to avoid violating the VRA through vote dilution. As stated above, *see supra* section I.A, Section 2(a) of the VRA prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). As relevant here, a Section 2 violation occurs if, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected group] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

In *Gingles*, the Supreme Court established that a minority group alleging a Section 2 vote dilution claim must prove three threshold preconditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51; *see also Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (affirming the applicability of the *Gingles* preconditions in the context of Section 2 challenges to single-member districts). "[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred

based on the totality of the circumstances." *Strickland*, 556 U.S. at 11-12.

Because Defendants assert that each of the challenged districts was narrowly tailored to prevent a violation of Section 2, Defendants must establish that they had a "strong basis in evidence" for believing that the three *Gingles* factors were present in each of the districts at the time they were drawn. *Vera*, 517 U.S. at 978 ("The State must have a 'strong basis in evidence' for finding that the threshold [*Gingles*] conditions for § 2 liability are present."); *Shaw II*, 517 U.S. at 908 n.4 ("[T]he legislature must have . . . a strong basis in evidence . . . *before* it implements the [relevant racial] classification." (emphasis added)); *Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996); *cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion) (noting that, under strict scrutiny, a state must have "convincing evidence that remedial action is warranted" before implementing an affirmative action measure). Absent a strong basis in evidence for the three factors, Defendants would have had no reason to anticipate a potential Section 2 violation and therefore no reason to believe the race-based districting was necessary to comply with Section 2. *See Harris*, 2016 WL 482052, at *18 ("A failure to establish any one of the *Gingles* factors is fatal to the defendants' claim.").

1. Defendants Never Analyzed *Gingles*' Third Factor

The evidence in this case demonstrates that Defendants erred in drawing each of the challenged districts by failing to evaluate whether there was a strong basis in evidence for the third *Gingles* factor

in any potential VRA district. We assume, without deciding, that Defendants had a strong basis in evidence for the first two *Gingles* factors regarding each challenged district. However, Defendants have failed to demonstrate that, for any challenged district, they had a strong basis in evidence for the third *Gingles* factor—racial bloc voting that, absent some remedy, would enable the majority usually to defeat the minority group's candidate of choice. Gingles, 478 U.S. at 51. This failure is fatal to their Section 2 defense.

"[R]acial bloc voting is a key element of a vote dilution claim." *Id.* at 55. However, not all racial bloc voting rises to a level that is cognizable within the meaning of *Gingles*' third factor. "Racial bloc voting" or "racially polarized voting"[45] refers to the circumstance in which "different races . . . vote in blocs for different candidates." *Id.* at 62; *see also id.* at 58 (characterizing "evidence that black and white voters generally prefer different candidates" as evidence of racially polarized voting). However, the third *Gingles* precondition requires racial bloc voting that is "legally significant"—that is, majority bloc voting at such a level that it enables the majority group "usually to defeat the minority's preferred candidates." *Id.* at 56. To be sure, evidence of "especially severe" racially polarized voting, in which there are few majority-group "crossover" votes for the minority group's preferred candidate, can help support finding the existence of *Gingles*' third factor.

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[45] We use the terms "racially polarized voting" and "racial bloc voting" interchangeably throughout this opinion. *See Gingles*, 478 U.S. at 52 n.18.

See, e.g., *LULAC*, 548 U.S. at 427 (explaining that Section 2 plaintiffs had demonstrated the third *Gingles* factor, in part, because the evidence indicated that racially polarized voting was "especially severe," with 92% of Latinos voting against a candidate and 88% of non-Latinos voting for him). But a general finding regarding the existence of any racially polarized voting, no matter the level, is not enough.

Moreover, because "[minority] voters' ability to elect representatives of their choice . . . will vary from district to district according to a number of factors," *Gingles*, 478 U.S. at 56, "[g]eneralized assumptions about the 'prevalence of racial bloc voting' do not qualify as a 'strong basis in evidence,'" *Harris*, 2016 WL 482052, at *18 (quoting *Vera*, 517 U.S. at 994 (O'Connor, J., concurring)). The key inquiry under *Gingles*' third factor, then, is whether racial bloc voting is operating at such a level that it would actually "'minimize or cancel' . . . [minority] voters' ability to elect representatives of their choice," if no remedial district were drawn. *Gingles*, 478 U.S. at 56 (internal citation omitted).

Therefore, to have a strong basis in evidence for the third *Gingles* precondition, a legislature must give consideration to the actual and potential *effect* of bloc voting on electoral outcomes. *See Lewis v. Alamance Cty.*, 99 F.3d 600, 608 (4th Cir. 1996) ("[A]ssessing whether 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate,' [requires] at a minimum [considering] a representative cross-section of elections.").

The evidence in this case demonstrates this is exactly what Defendants *did not* do. As explained below, Defendants never asked whether there was a strong basis in evidence that the "majority [was voting] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" before they drew the challenged districts. *Gingles*, 478 U.S. at 51.

It was revealed at trial that the Redistricting Chairs misconstrued what the third *Gingles* factor requires. Representative Lewis testified that he understood the third *Gingles* factor to be present so long as there is "some evidence of racially polarized voting." Trial Tr. vol. III, 223:21-23 ("[T]he third criteri[on] in drawing the VRA [districts] is that you have to have some evidence of racially polarized voting . . . ."). Similarly, according to Senator Rucho, the third *Gingles* precondition would be satisfied if "racially polarized voting exist[s]." Trial Tr. vol. IV, 50:7-9 ("[T]he third [*Gingles* factor] is the . . . requirement that there was evidence that racially polarized voting existed."). Thus, during the 2011 redistricting, evidence of *any* racially polarized voting, regardless of its extent, was considered sufficient to show *Gingles*' third precondition—racially polarized voting rising to the level that the majority group "vote[s] sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56.

In fact, the Redistricting Chairs testified that they never made any determination whether majority bloc voting existed at such a level that the candidate of choice of African-American voters would

usually be defeated without a VRA remedy. Trial Tr. vol. IV, 52:8-18 (Rucho) ("[Q:] Did you do any examination . . . as you were drawing up VRA districts as to whether black candidates of choice would be outvoted by whites unless you upped the BVAP? [A:] . . . I don't believe we did any of that. . . ."); *see also id.* at 33:9-13 (confirming that VRA districts were drawn "regardless of voting patterns" in a given geographic area as long as there was evidence of racially polarized voting); Trial Tr. vol. III, 228:16-229:4 (Lewis) (explaining that VRA districts were drawn where "there was a demonstrated history of racially polarized voting"). Thus, Defendants never asked the right question to determine whether there was a strong basis in evidence for the third *Gingles* factor.

It is also clear that Dr. Hofeller never conducted an inquiry to determine whether racially polarized voting sufficient to enable the majority usually to defeat the candidate of choice of African-American voters was present in the challenged districts. Dr. Hofeller did not conduct any district effectiveness analysis[46] prior to drawing the districts, Trial Tr. vol. V, 82:7-11 (Hofeller), nor did he perform a racial polarization analysis, *id.* at 82:1-5; Trial Tr. vol. IV, 213:3-5 (Hofeller). According to Dr. Hofeller, he drew the race-based districts without regard to whether

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[46] A "district effectiveness analysis" is a district-specific evaluation used to determine the minority voting-age population level at which a district "become[s] effective in providing [a] realistic opportunity for . . . voters [of that minority group] to elect candidates of their choice." Trial Tr. vol. III, 14:1-12 (Lichtman).

African-American candidates of choice were actually being elected or defeated. Trial Tr. vol. V, 80:23-81:3, 88:5-12; *see also* Pls.' Designated Deps. at 282-83 (Hofeller) (explaining that, when drawing the districts, he "was not making a judgment on what was required by Section 2").

In sum, the evidence demonstrates that no analysis was conducted during the 2011 redistricting to determine whether there was a strong basis in evidence to believe the "majority [was voting] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. Thus, Defendants could not have determined any of the challenged districts to be reasonably necessary to cure a potential Section 2 violation. This fundamental oversight is fatal to Defendants' Section 2 defense.

2. Evidence Proffered by Defendants

The foregoing discussion of the errors Defendants made in drawing the challenged districts demonstrates those districts were not drawn with a strong basis in evidence for the third *Gingles* factor. The evidence that Defendants put forth in support of their Section 2 defense is likewise insufficient. For the reasons stated below, we find that Defendants have failed to proffer evidence demonstrating they had a strong basis in evidence to fear Section 2 liability. Indeed, a review of Defendants' arguments regarding this proffered evidence confirms their erroneous interpretation of the third *Gingles* precondition.

a. Racial Polarization Studies

Defendants have proffered two racial polarization reports which were considered during the 2011 redistricting process and which, they contend, provided a strong basis in evidence justifying their race-based choices. *See, e.g.*, Defs.' Post-trial Findings at 224-25.

First, Defendants rely on a report prepared by Dr. Ray Block and submitted to the General Assembly at a May 9, 2011, public hearing. *See* Defs.' Ex. 3013-8 (Report by Dr. Ray Block, Jr., "Racially Polarized Voting in 2006, 2008, and 2010 in North Carolina State Legislative Contests"); Defs.' Ex. 3013-6 at 9-10; Defs.' Ex. 3013-7 at 3. The Block report examines data from a sampling of North Carolina Congressional and state legislative contests from 2006 to 2010 involving an African-American candidate. Using estimates derived from ecological inference methods,[47] Dr. Block estimates "the proportion of African-American and non-Black voters in each electoral contest who preferred the candidate of color." Defs.' Ex. 3013-8 at 3. Based on these estimates, Dr. Block concludes that the voting patterns from the elections studied "suggest the presence of racially polarized voting" in the state. *Id.* at 4.

Second, Defendants proffer a June 14, 2011, report by Dr. Thomas Brunell. *See* Defs.' Ex. 3033 ("Report on Racially Polarized Voting in North

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[47] Ecological regression analysis is a standard technique used to infer voting behavior among distinct population groups. *Gingles*, 478 U.S. at 52-53, 53 n.20.

Carolina" by Thomas L. Brunell, Ph.D.). During the 2011 redistricting, the General Assembly retained Dr. Brunell to examine whether or not racially polarized voting exists in fifty-one North Carolina counties.[48] *Id.* at 3. In his report, Dr. Brunell analyzes North Carolina precinct-level voting data principally derived from three elections. Subjecting this data to various scientific methods, including county-by-county bivariate regression analysis, Trial Tr. vol. IV, 134:13-19 (Brunell), Dr. Brunell concludes that there is "statistically significant racially polarized voting in 50 of the 51 counties" studied, Defs.' Ex. 3033 at 3.

Contrary to Defendants' contentions, the Block and Brunell reports do not establish a strong basis in evidence for *Gingles*' third factor in any potential district.

First, while both reports conclude that there is evidence of racially polarized voting in North Carolina, neither report "speak[s]—one way or the other—to the effects of racially polarized voting," i.e., to how racial polarization is affecting election outcomes in any geographic area. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 438 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004); *see id.* (discussing racial bloc voting study without data on election outcomes as "incomplete and insufficient to address specific aspects of the third *Gingles* factor"). Indeed, the

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[48] The North Carolina counties Dr. Brunell examined were the "40 counties [that were] covered by Section 5 of the VRA, along with 11 other counties: Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrrell, Wake, and Warren." Defs.' Ex. 3033 at 3.

Block report does not mention specific election results at all. Defs.' Ex. 3013-8. And the Brunell report does not indicate the prevailing candidate in the three principal elections examined. Defs.' Ex. 3033; *see also* Trial Tr. vol. IV, 148:7-11; 149:21-24 (Brunell) (confirming that, for the purposes of his 2011 report, "it doesn't matter . . . if the candidate of choice of black voters wins [an] election or not.").

Defendants' reliance on the Brunell and Block reports' generalized conclusions regarding racially polarized voting demonstrates their misunderstanding of *Gingles*' third factor. As discussed above, the third *Gingles* inquiry is concerned only with "legally significant racially polarized voting," which occurs when the "majority [group] votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 55-56. On the other hand, the general term "racially polarized voting" is defined much more broadly and simply refers to when different racial groups "vote in blocs for different candidates." *Gingles*, 478 U.S. at 62. Dr. Brunell testified that his report's reference to "statistically significant" racially polarized voting means only that the evidence of racially polarized voting cannot be attributed to "chance alone." Trial Tr. vol. IV, 136:18-137:3; *see* Defs.' Ex. 3033 at 4.

This crucial difference between *legally* significant and *statistically* significant racially polarized voting becomes clear when one considers the expansive set of circumstances the latter term can describe. It characterizes elections where 90% of a minority group's voters but only 10% of the

majority group's voters prefer a certain candidate. Yet, the label applies equally well where there is only a "minimal degree of polarization," such as when 51% of a minority group's voters prefer a candidate and 49% of the majority group's voters prefer that same candidate (so long as that result is statistically significant). Trial Tr. vol. III, 17:5-10 (Lichtman); *see also* Pls.' Designated Deps. at 61-62 (Brunell).

For example, Dr. Brunell concluded that there was statistically significant racially polarized voting in every county he examined except one.[49] Defs.' Ex. 3033 at 3. Yet, the county-specific non-African-American crossover voting estimates for the three principal elections he analyzed run the gamut.[50] *See, e.g.*, *id.* at 7 (indicating non-African-American crossover voting ranging from 4.7% (Greene County) to 59.2% (Durham County) in the 2008 Democratic Presidential Primary Election); *id.* at 12-13 (reporting non-African-American crossover voting ranging from 20.1% (Cleveland County) to 61.7%

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[49] The report indicates that Camden County had too few precincts to make a county-specific determination regarding the existence of statistically significant racially polarized voting. Defs.' Ex. 3033 at 3; *see also* Trial Tr. vol. IV, 134:22-24 (Brunell).

[50] At trial, Dr. Brunell testified that he made an "arithmetic error" when calculating the figures in the "Black Voter %" column in each of the tables of his 2011 report. Trial Tr. vol. IV, 137:20-140:4. However, the error did not implicate the non-African-American crossover voting estimates, and Dr. Brunell testified that correcting the error did not change his conclusion that there is statistically significant racially polarized voting in fifty North Carolina counties. *Id.* at 139:16-25. In addition, neither party alleges that Defendants were aware of the error at the time the Enacted Plans were adopted.

(Robeson County) in the 2004 State Auditor Election).

Even more strikingly, the estimates in the Block report indicate that, in thirty-three out of the fifty-three elections Dr. Block studied, African-American and non-African-American voters preferred the *same* candidate. Defs.' Ex. 3013-8 at 6-8 (Tables 1-3). That is, in thirty-three of the elections, a majority of non-African-American voters preferred the African-American voters' candidate of choice. *Id.* Such data cannot be construed as conclusive evidence of the third *Gingles* factor—bloc voting causing African-American voters' candidate of choice to usually be *defeated*.

Finally, Defendants make no argument that the differing levels of non-African-American crossover voting in the elections encompassed in the polarization studies informed their decision to draw the challenged districts,[51] nor have they made any effort to link such evidence to other district-specific data reflecting that the minority group's candidates of choice were usually defeated by majority bloc voting. Had Defendants done so, perhaps this would be a different case.

Here, the evidence demonstrates that the Defendants—consistent with the misinterpretation that any racially polarized voting can constitute a

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[51] For example, in post-trial briefing, Defendants simply cite the Brunell study for the proposition that each of the challenged districts encompassed counties that "were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting." *See, e.g.*, Defs.' Post-trial Findings at 71, 79, 83, 88, 93.

strong basis in evidence for *Gingles*' third factor—applied the 50%-plus-one rule across the state without regard to the differing levels of crossover voting reported in either racial polarization study.[52] *See, e.g.*, Trial Tr. vol. IV, 33:9-13 (Rucho) ("[Q:] And you applied the 50 percent rule regardless of voting patterns in the county; correct? [A:] The fact that there was racially polarized voting that was clearly outlined . . . we felt that that was what our responsibility was."); Defs.' Ex. 3028 at 23 (Hofeller) (explaining reliance on the "assumption" and "universally accepted conclusion" that racial bloc voting existed in the state of North Carolina, a conclusion which was "confirmed by Dr. Brunell's *subsequent* study." (emphasis added)).

Accordingly, we conclude that the two racial polarization studies on which Defendants rely fail to demonstrate a strong basis in evidence justifying the challenged districts as drawn.

b. Election Outcomes

The second type of evidence Defendants have put forth as justification for the race-based challenged districts is evidence of African-American candidates losing elections.

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[52] Similarly, Representative Lewis was asked by a fellow legislator during the 2011 redistricting, "[D]id the Brunell . . . study provide any specific recommendations to develop . . . 50 percent districts statewide? In other words, was that contained in the study?" Joint Ex. 1019 at 35. Representative Lewis responded, "I don't know, but *it is irrelevant*, as that is our understanding of the law . . . ." *Id.* (emphasis added).

Defendants' post-trial briefing identifies some specific elections under the Benchmark Plans in which African-American candidates were defeated. *See, e.g.*, Defs.' Post-trial Findings at 21-23, 122, 152, 159, 167. Yet, Defendants make no coherent arguments explaining if and how these losses influenced their drawing of particular districts or demonstrating how these occasional election losses establish that, absent a Section 2 remedy, the majority can usually defeat the minority group's candidate of choice in the specific districts.

In fact, there are only two challenged districts—Senate Districts 5 and 21—where we can piece together from the evidence an argument that losses by African-American candidates provided even partial motivation for increasing the BVAP to make a particular district majority-black. *See* Joint Ex. 1005 at 3 (June 17, 2011, Joint Statement by Redistricting Chairs) (suggesting that a loss by an African-American candidate in Senate District 5 motivated the creation of a majority-black district); Joint Ex. 1015 at 93 (July 25, 2011, Senate Floor Session) (same); Joint Ex. 1023 at 15-16 (Senate 2011 Section 5 Submission) (discussing changes to Senate District 21 in the Enacted Plan in the context of past election results); Trial Tr. vol. IV, 27:11-29:9 (Rucho) (same).

But Defendants have provided no explanation for how these losses informed a district-specific assessment regarding the third *Gingles* factor. For example, with respect to Senate District 5, Defendants have not explained why a *single loss* by Senator Don Davis provided a strong basis in evidence to believe that racially polarized voting in

that district was so severe that the African-American voters' candidate of choice would *usually be defeated* unless Senate District 5 was drawn to be majority-black. *See* Defs.' Ex. 3020 at 10 (indicating that African-American Democrat Don Davis won Senate District 5's general election in 2008, but was defeated in 2010).

Additionally, Defendants' citation to election losses by African-American candidates, without further explanation, reveals a reliance on a faulty premise: that the African-American voters' candidate of choice will always be African-American.[53] However, operating on the basis of such an

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[53] Indeed, Defendants seem to have operated under this assumption when they created enacted Senate District 32. In drawing the district, Defendants purposefully drew Linda Garrou out of its boundaries, citing the fact that she was a "white incumbent" who had "defeated African American candidates in Democratic Primaries in 2004 and 2010." Joint Ex. 1005 at 6; *see also* Trial Tr. vol. IV, 55:13-19 (Rucho); *supra* section II.B.7. However, Garrou defeated African-American candidates to win the 2004 and 2010 democratic primaries by large margins, capturing over 80% of the vote in each election. Joint Ex. 1048 at 25; Defs.' Ex. 3020 at 13. And, according to Defendants themselves, "African Americans [comprised] 68.71% of [the] registered Democrats" in Senate District 32 under the benchmark plan. Defs.' Post-trial Findings at 94. Not surprisingly, Senator Rucho confirmed at trial that he did not make a determination as to whether Linda Garrou was the African-American voters' candidate of choice when he decided to draw her out of the district. Trial Tr. vol. IV, 55:13-19. Without a strong basis in evidence that Linda Garrou herself was not the African-American voters' candidate of choice, Defendants could not have concluded that drawing Senate District 32 based on race was "reasonably necessary" to remedy legally significant racially polarized voting.

assumption is improper, as it is clear that a non-minority candidate can be the candidate of choice of a minority group. *Lewis*, 99 F.3d at 607 ("[T]he minority-preferred candidate may be either a minority or a non-minority."); *Rodriguez*, 308 F. Supp. at 441 ("The question is not whether Latinos can elect a preferred candidate who is Hispanic, but a preferred candidate period."); *see LULAC*, 548 U.S. at 444-5 (indicating that testimony that an "Anglo" candidate was the favored candidate of the African-American community and served that community's interests supported a finding that the "Anglo" candidate was African-American voters' candidate of choice, but holding that the district court did not err in crediting contradictory testimony to reach the opposite conclusion).

Moreover, even if we accept, for the purpose of argument, Defendants' assumption that an African-American candidate will always be the African-American voters' candidate of choice, Defendants nonetheless seem to have ignored the elections showing African-American candidates' success when they drew the challenged districts. For example, African-American candidates were elected in 2004, 2006, 2008 and 2010 (that is, every election held under the Benchmark Plans) in benchmark Senate Districts 4, 14, 20, 28, 38 and 40 and benchmark House Districts 5, 12, 21, 29, 31, 42 and 48. Defs.' Ex. 3020 at 10-11, 13-14, 21-25.[54] Each of the

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[54] This data was readily available to the Chairs at the time of the 2011 redistricting. The General Assembly's legislative staff submitted to the Redistricting Chairs and Committees charts detailing the results of all House and Senate elections between

aforementioned districts had a BVAP *below* 50% according to 2000 and 2010 census data. Defs.' Ex. 3000 at 151, 158; Defs.' Ex. 3001 at 315, 332. Yet, for each of these districts, Defendants used race to increase the BVAP percentage to 50%-plus-one in the Enacted Plans.[55] *See supra* section II.B. It would therefore be difficult to accept any assertions on Defendants' part that there was a strong basis in evidence to believe that these challenged districts were necessary, as drawn, to remedy racial bloc voting that would "*usually* be able to defeat" African-American voters' candidate of choice. *Gingles*, 478 U.S. at 49.

During the redistricting process, the Redistricting Chairs' fellow legislators repeatedly asked the Chairs why such BVAP increases would be necessary to comply with Section 2. For example, at a House Redistricting Committee Meeting, Representative Marvin Lucas, an African-American legislator representing House District 42, Defs.' Ex.

2006 and 2010 involving minority candidates. *See* Joint Ex. 1048; Joint Ex. 1049; Trial Tr. vol. III, 129:17-130:2 (Lewis); Trial Tr. vol. IV, 13:15-19 (Rucho); Trial Tr. vol. IV, 101:23-102:15, 107:18-108:17 (Churchill). For each election reported, the charts indicate the name, race, and party affiliation of the competing candidates, identify which candidate won, and specify the percentage of the vote captured. *See* Joint Ex. 1048; Joint Ex. 1049. The charts also indicate the racial makeup of each district using 2000 census data. *Id.*

[55] This list of electoral successes in certain benchmark districts does *not* include additional, similar successes in benchmark districts that do not correspond geographically with challenged districts. The list only includes successes in benchmark districts that overlap substantially with the geographic locations of their enacted counterparts.

3020-14 at 3, asked why there was a "need to increase the [BVAP] percentages" in districts like his own "where . . . history tends to show that there has been no problem" electing African-American candidates, Joint Ex. 1019 at 7. In response, Representative Lewis simply stated: "The VRA districts that appear in [the proposed plan] were all drawn at . . . a 50 percent plus one[] level to foreclose the possibility of any Section 2 lawsuit." *Id.* at 8. Similarly, when confronted with a question about why a BVAP percentage increase was necessary in a particular district even though African-American candidates were already winning, Senator Rucho replied: "We're just following the law as devised by the *Strickland* decision for a minority-majority [sic] district . . . ." Joint Ex. 1013 at 40-41.

Suffice it to say that Defendants knew they were increasing the BVAP in districts where African-American candidates, who were purportedly also the African-American voters' candidates of choice, were already consistently winning under the Benchmark Plans. We can only conclude that such information was irrelevant to them when it came to determining the existence of *Gingles*' third precondition and applying their 50%-plus-one rule.

In their post-trial briefing, Defendants have also cited those instances where an African-American candidate elected under the benchmark version of a challenged district was uncontested, an incumbent, or a more successful fundraiser than his or her opponent. What Defendants have not done is explain how any of this information is relevant to justifying their race-based districting. Defendants' citations to

fundraising numbers and incumbency status do nothing to demonstrate that the challenged districts were drawn with a strong basis in evidence that the white majority voted as a bloc to *usually defeat* the candidate of choice of African-American voters.

Lacking such explanations, we take Defendants at their word: the 50%-plus-one rule was applied to create majority-black districts, including the challenged districts, "when[ever] it [was] possible to do so," Joint Ex. 1007 at 5, without any district-specific determination that racially polarized voting was significant enough to enable the majority to usually defeat the candidate of choice of African-American voters, *see* Trial Tr. vol. IV, 52:8-13 (Rucho).

c. Defendants' Other Evidence

The remaining evidence Defendants proffer in support of their Section 2 defense for the challenged districts warrants little attention.

Defendants point to lay testimony given during the 2011 redistricting, including testimony from voting rights advocates, to the effect that racially polarized voting existed in the state and that majority-black districts were still needed, *see* Defs.' Ex. 3015A, Defs.' Ex. 3013-7; the history and locations of prior "VRA districts" enacted by the General Assembly; alternative redistricting plans submitted during the 2011 redistricting; a law review article discussing the state's history of VRA litigation, *see* Defs.' Ex. 3013-9; and a letter from the University of North Carolina (UNC) School of Government discussing redistricting, Defs.' Ex. 3014-11.

While we would not dispute that some of this information is relevant and should be considered during legislative districting, none of the evidence Defendants have cited—without additional proof and district-specific analysis—can constitute a strong basis in evidence demonstrating that any of the challenged districts were reasonably necessary as drawn to avoid a Section 2 violation. For instance, the lay testimony Defendants cite is overwhelmingly general, and any evidence regarding *Gingles*' third factor in any particular district is sparse to non-existent.

Moreover, Section 2 does not force the states to perpetuate race-based districts simply because they may have been necessary in the past, or because advocates lobby for them. *See Strickland*, 556 U.S. at 23-24 ("Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns."). In any event, the Enacted Plans include a substantially higher number of majority-black districts as compared to the Benchmark Plans or any alternative plan that was proposed. *Compare* Defs.' Ex. 3000 at 191, *and* Defs.' Ex. 3001 at 500-02, *with* Defs.' Ex. 3000 at 151, 169, 201, 212, *and* Defs.' Ex. 3001 at 315-17, 356-58, 428-30, 452-54. *See also supra* section I.B.

Additionally, the law review article that Defendants proffer, while helpful context, is "no substitute for proof [or a strong basis in evidence] that [legally significant] bloc voting [is] occur[ring]" in a particular district. *Growe*, 507 U.S. at 42. The article discusses the history of voting rights litigation

in North Carolina, but it makes no findings as to whether the third *Gingles* precondition is present in any particular areas of North Carolina today. *See* Anita S. Earls et. al., *Voting Rights in North Carolina: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008). In fact, the article does not discuss *Gingles*' third precondition at all. *Id.*

Likewise, the letter from the UNC School of Government does not provide Defendants with a strong basis in evidence to fear Section 2 liability. The letter itself makes that clear: "recent analysis of voting patterns and the other Section 2 elements would be necessary to assert with any confidence that a Section 2 violation might be found in a particular part of the state today." Defs.' Ex. 3014-11 at 6.

* * *

In summary, the testimony in this litigation demonstrates that, when drawing the challenged districts, Defendants made no district-specific assessment regarding the third *Gingles* factor (as properly understood). Moreover, Defendants have failed to establish during this litigation that the challenged districts were justified by a strong basis in evidence. We therefore conclude that the challenged districts were not narrowly tailored to comply with Section 2.

B. Section 5 as a Compelling Interest

Finally, we turn to whether the challenged districts were narrowly tailored to comply with Section 5 of the VRA. Section 5 "prohibits a covered jurisdiction from adopting any change that 'has the purpose of or will have the effect of diminishing the

While we would not dispute that some of this information is relevant and should be considered during legislative districting, none of the evidence Defendants have cited—without additional proof and district-specific analysis—can constitute a strong basis in evidence demonstrating that any of the challenged districts were reasonably necessary as drawn to avoid a Section 2 violation. For instance, the lay testimony Defendants cite is overwhelmingly general, and any evidence regarding *Gingles*' third factor in any particular district is sparse to non-existent.

Moreover, Section 2 does not force the states to perpetuate race-based districts simply because they may have been necessary in the past, or because advocates lobby for them. *See Strickland*, 556 U.S. at 23-24 ("Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns."). In any event, the Enacted Plans include a substantially higher number of majority-black districts as compared to the Benchmark Plans or any alternative plan that was proposed. *Compare* Defs.' Ex. 3000 at 191, *and* Defs.' Ex. 3001 at 500-02, *with* Defs.' Ex. 3000 at 151, 169, 201, 212, *and* Defs.' Ex. 3001 at 315-17, 356-58, 428-30, 452-54. *See also supra* section I.B.

Additionally, the law review article that Defendants proffer, while helpful context, is "no substitute for proof [or a strong basis in evidence] that [legally significant] bloc voting [is] occur[ring]" in a particular district. *Growe*, 507 U.S. at 42. The article discusses the history of voting rights litigation

in North Carolina, but it makes no findings as to whether the third *Gingles* precondition is present in any particular areas of North Carolina today. *See* Anita S. Earls et. al., *Voting Rights in North Carolina: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008). In fact, the article does not discuss *Gingles*' third precondition at all. *Id.*

Likewise, the letter from the UNC School of Government does not provide Defendants with a strong basis in evidence to fear Section 2 liability. The letter itself makes that clear: "recent analysis of voting patterns and the other Section 2 elements would be necessary to assert with any confidence that a Section 2 violation might be found in a particular part of the state today." Defs.' Ex. 3014-11 at 6.

* * *

In summary, the testimony in this litigation demonstrates that, when drawing the challenged districts, Defendants made no district-specific assessment regarding the third *Gingles* factor (as properly understood). Moreover, Defendants have failed to establish during this litigation that the challenged districts were justified by a strong basis in evidence. We therefore conclude that the challenged districts were not narrowly tailored to comply with Section 2.

B. Section 5 as a Compelling Interest

Finally, we turn to whether the challenged districts were narrowly tailored to comply with Section 5 of the VRA. Section 5 "prohibits a covered jurisdiction from adopting any change that 'has the purpose of or will have the effect of diminishing the

ability of [the minority group] to elect their preferred candidates of choice.'" *Alabama*, 135 S. Ct. at 1272 (alteration in original) (quoting 52 U.S.C. § 10304(b)). In other words, this section of the VRA prohibits any redistricting "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

As an initial matter, we note that eleven of the challenged districts do not include any county, in whole or in part, that was covered by Section 5 in 2011, and therefore those districts could not have been drawn to remedy a Section 5 violation.[56]

With regard to the challenged districts that were covered by Section 5, we conclude that Defendants have not put forth a strong basis in evidence that any of those districts were narrowly tailored to avoid retrogression.

To satisfy strict scrutiny, "the remedy [must be] narrowly tailored to the asserted end." *Shaw II*, 517 U.S at 915; *see also id.* at 916 ("[T]he legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored."). In this context, a district survives strict scrutiny if Defendants put forth a strong basis in evidence that their race-based redistricting decision was reasonably necessary to comply with Section 5, i.e., to prevent "retrogression in respect to racial minorities' 'ability . . . to elect their preferred

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[56] These districts are: Senate Districts 14, 32, 38, and 40, and House Districts 29, 31, 33, 38, 99, 102, and 107. Joint Ex. 1012 at 10; Joint Ex. 1003; Joint Ex. 1004.

candidates of choice.'" *Alabama*, 135 S. Ct. at 1263 (quoting 52 U.S.C. § 10304(b)). "A reapportionment plan [is] not . . . narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655. In other words, Section 5 does not "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Id.*

The Supreme Court also has made clear that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage." *Alabama*, 135 S. Ct. at 1272. "Rather, [Section] 5 is satisfied if minority voters retain the ability to elect their preferred candidates." *Id.* at 1273. Therefore, states should not rely "upon a mechanically numerical view as to what counts as forbidden retrogression." *Id.* As the Supreme Court stated in *Alabama*:

> [T]he legislature asked the wrong question with respect to narrow tailoring. They asked: "How can we maintain present minority percentages in majority-minority districts?" But given § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"

Id. at 1274.

Here, Defendants surely failed to ask the right question. Instead, they drew every "VRA district" at

50%-plus-one BVAP or higher, regardless of whether the benchmark BVAP was 21% or 55%, and regardless of whether a BVAP of 50%-plus-one was reasonably necessary "to maintain the minority's present ability to elect the candidate of its choice." *Id.*; *see* Trial Tr. vol. IV, 33:4-13 (Rucho) ("[Q:] [Y]ou applied the 50 percent rule in Section 2 counties and Section 5 counties alike, didn't you? [A:] . . . When we had Voting Rights Act districts where we could and achieved them, yes, sir, that was what was done. [Q:] And you applied the 50 percent rule regardless of voting patterns in the county; correct? [A:] The fact that there was racially polarized voting that was clearly outlined . . . we felt that that was what our responsibility was.").

Alabama makes clear that such a "mechanically numerical view" is not narrowly tailored to avoid retrogression. 135 S. Ct. at 1273; *see also Harris*, 2016 WL 482052, at *21 (holding that North Carolina "legislators had no basis—let alone a strong basis—to believe that an inflexible racial floor of 50 percent plus one person was necessary" to comply with Section 5 in the challenged district); *Page*, 2015 WL 3604029, at *18 ("The legislature's use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns, suggests that voting patterns in the [challenged district] were not considered individually." (internal quotations omitted)).[57] Further, this racial target was applied to

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[57] The one exception to this rule is Senate District 32, which Defendants drew with a BVAP of 42.53%. However, Senate District 32 is located entirely within Forsyth County, which was not covered by Section 5.

increase some districts' BVAPs by over twenty percent, despite the fact that such a dramatic increase could never be required to prevent "retrogression." *See Vera*, 517 U.S. at 983 ("The problem with the State's [Section 5] argument is that it seeks to justify not maintenance, but substantial augmentation, of the African- American population percentage in [the challenged district]."); *Shaw I*, 509 U.S. at 655.

Although "we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive," the legislature must have a "strong basis in evidence" to support its use of racial classifications in redistricting. *Alabama*, 135 S. Ct. at 1273-74. For instance, the *Alabama* Court noted with approval the Justice Department's Section 5 redistricting guidelines, which stated that a determination of the BVAP required to avoid retrogression under Section 5 should be based on a "functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 1272 (quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)). Here, Defendants have put forth no evidence that they performed *any* analysis to determine the appropriate BVAP for the challenged districts. In fact, they acknowledge that they used the 50%-plus-one target for each of the districts covered by Section 5. Defs.' Post-trial Findings at 228. Therefore, Defendants have failed to show a "strong basis in evidence" that the BVAP for each challenged district was reasonably necessary to avoid retrogression.

In determining whether redistricting plans were narrowly tailored to comply with Section 5, the Supreme Court has also repeatedly rejected "maximization" policies that require the state to draw majority-minority districts wherever possible, or to achieve a pre-determined number of districts. *Miller*, 515 U.S. at 924-25; *Shaw II*, 517 U.S. at 913.

In *Shaw II*, for example, the state legislature tried to follow the Justice Department's instruction that when "you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen, or black Congressional Districts in this State." 517 U.S. at 913. That essentially describes the policy of "rough proportionality" Defendants applied throughout this redistricting. *See supra* section II.A.1.c. But as the Supreme Court has stated, such a proportionality target, pursued without any district-specific analysis, "is not properly grounded in § 5," *Shaw II*, 517 U.S. at 913, and so cannot justify the districts drawn in this case.

In sum, Defendants have not shown a strong basis in evidence for their conclusion that the race-based redistricting in this case—in particular their use of the mechanical 50%-plus-one target and their proportionality goal—was reasonably necessary to avoid a Section 5 violation.

Defendants nevertheless assert that "[a] challenged district furthers a compelling interest if it was reasonably necessary to obtain preclearance of [a redistricting] plan" or "to avoid preclearance objections." Defs.' Post-trial Br. at 7, ECF No. 116 (internal quotations omitted). However, the Supreme

Court has made quite clear that avoiding preclearance objections cannot be a compelling interest justifying the use of racial classifications. In *Miller*, even when the creation of a challenged district was explicitly "required in order to obtain preclearance," the Supreme Court "d[id] not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." 515 U.S. at 921-22. Instead, the *Miller* Court struck down a challenged district because the use of race was not "reasonably necessary under a constitutional reading and application" of the VRA. *Id.* at 921.

Obtaining preclearance was not a compelling interest in *Miller*, and it is even less of one here. Defendants in this case point to no evidence that the Justice Department "required" the state to draw the challenged districts, as was the case in *Miller*, or that the Justice Department issued "demands" for additional majority-black districts, as it did in *Shaw II*, 517 U.S. at 911. Rather, Defendants wish for us to insulate them from constitutional review for any race-based classification they unilaterally determined might expedite preclearance.[58] That we cannot do.

* * *

In conclusion, we hold that Defendants have not carried their burden to show that each of the

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[58] Senator Rucho explained at trial that "what we tried to do is put together a map that would absolutely pass preclearance approval because, without that, we could not continue on our effort to be prepared for the 2012 election cycle." Trial Tr. vol. IV, 21:16-19.

challenged districts was supported by a strong basis in evidence and narrowly tailored to comply with either Section 2 or Section 5. Therefore, all districts challenged in this case violate the Equal Protection Clause and are unconstitutional.

IV. Remedy

Having found that twenty-eight districts in the Enacted Plans are racial gerrymanders in violation of the Equal Protection Clause, we must now address the proper remedy. Plaintiffs have asked for an immediate injunction blocking the use of the unconstitutional districts in any future elections. We agree that these unconstitutional, challenged districts have already caused Plaintiffs substantial stigmatic and representational injuries, and that Plaintiffs are entitled to vote under constitutional districting plans as soon as possible.

However, we are also cognizant that the timing for the implementation of injunctive relief is particularly delicate in this case. The next general elections for the North Carolina House and Senate are scheduled to take place in November 2016, less than three months from now. In addition, the 2016 House and Senate primary elections were already held under the challenged plans on March 15, 2016.

The Supreme Court has stated that:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the

> existing apportionment scheme was found invalid.

Reynolds v. Sims, 377 U.S. 533, 585 (1964).

Moreover, "because it is the domain of the States, and not the federal courts, to conduct apportionment," *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993), we must provide the North Carolina General Assembly with a "reasonable opportunity" to draw remedial districts in the first instance, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also id.* at 539 ("[R]edistricting . . . is a legislative task which the federal courts should make every effort not to pre-empt."). In addition, remedying such a large number of unconstitutional districts will likely require changes to districts this decision has not directly rendered invalid.

Based on the schedules put forth by the parties in their post-trial briefing, we regrettably conclude that due to the mechanics of state and federal election requirements, there is insufficient time, at this late date, for: the General Assembly to draw and enact remedial districts; this Court to review the remedial plan; the state to hold candidate filing and primaries for the remedial districts; absentee ballots to be generated as required by statute; and for general elections to still take place as scheduled in November 2016.

When "[n]ecessity" so requires, the Supreme Court has "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to . . . constitutional requirements." *Upham v. Seamon*, 456 U.S. 37, 44 (1982). After

careful consideration, and with much reluctance, we conclude that necessity demands such a result today. We decline to order injunctive relief to require the state of North Carolina to postpone its 2016 general elections, as we believe such a remedy would cause significant and undue disruption to North Carolina's election process and create considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials. Instead, like other courts confronted with similarly difficult circumstances, we will allow the November 2016 elections to proceed as scheduled under the challenged plans, despite their unconstitutionality. *See, e.g.*, *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 554 (E.D. Va. 2014), *vacated on other grounds sub nom.*, *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015); *Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *aff'd sub nom.*, *Bush v. Vera*, 517 U.S. 952 (1996).

Nonetheless, Plaintiffs, and thousands of other North Carolina citizens, have suffered severe constitutional harms stemming from Defendants' creation of twenty-eight districts racially gerrymandered in violation of the Equal Protection Clause. These citizens are entitled to swift injunctive relief.

Therefore, we hereby order the North Carolina General Assembly to draw remedial districts in their next legislative session to correct the constitutional deficiencies in the Enacted Plans. By separate order, we will direct the parties to file supplemental briefs on an appropriate deadline for such action by the legislature, on whether additional or other relief

would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and schedule of that relief.

V. Conclusion

Section 2 of the VRA continues to play an important role in redistricting, and legislatures must undertake a district-specific analysis to identify and cure potential Section 2 violations. Our decision today should in no way be read to imply that majority-black districts are no longer needed in the state of North Carolina. Nor do we suggest that majority-black districts could not be drawn—lawfully and constitutionally—in some of the same locations as the districts challenged in this case. Rather, our holding today is attributable primarily to the explicit and undisputed methods that the General Assembly employed in the construction of these districts, and to the inadequacy of the district-specific evidence and arguments put forth by Defendants in this case.

For instance, if during redistricting the General Assembly had followed traditional districting criteria and, in doing so, drawn districts that incidentally contained majority-black populations, race would not have predominated in drawing those districts. *See Shaw I*, 509 U.S. at 646 ("[R]ace consciousness does not lead inevitably to impermissible race discrimination. . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes."). In this case, for example, Plaintiffs did not even challenge House Districts 23 and 27, which are reasonably compact

majority-black districts that follow county lines. *See* Defs.' Ex. 3001 at 494, 500.[59]

Similarly, if the General Assembly had demonstrated a strong basis in district-specific evidence that the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," *Gingles*, 478 U.S. at 51, and that the other requirements for a Section 2 violation were present in a particular area, the State could have drawn an appropriately tailored remedial district. Evidence of a potential Section 2 violation may exist in some parts of the state, and if such evidence is *properly* examined and demonstrated, it certainly could justify future majority-minority districts.

But the General Assembly did not do any of this in carrying out its mechanical approach to districting. Further, although the legislature repeatedly identified certain cases as key in its purported attempt to draw maps that would "survive any possible legal challenge," Joint Ex. 1007 at 1, it misinterpreted parts of these cases, *see, e.g.*, *Strickland*, 556 U.S. at 24 ("In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. In those

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[59] We note that preserving traditional district boundaries is a race-neutral districting criterion that may be lawfully considered in drawing districts. *See Alabama*, 135 S. Ct. at 1271; *Vera*, 517 U.S. at 977. Therefore, maintaining the rough location and boundaries of existing majority-minority districts, if the evidence does not otherwise suggest that race was the predominant motive, might not trigger strict scrutiny review.

areas majority-minority districts would not be required in the first place."). The legislature also failed to heed the cases that would have helped to prevent this very litigation. *See, e.g.*, *Shaw I*, 509 U.S. at 648 ("[A] racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."); *Miller*, 515 U.S. at 927-28 ("It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.").

This state's citizens have the right to vote in districts that accord with the Constitution. We therefore order that new maps be drawn that comply with the Constitution and the Voting Rights Act.

SO ORDERED, this the 11th day of August, 2016.

/s/ James A. Wynn, Jr.
James A. Wynn, Jr.
United States Circuit Judge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

No. 1:15-cv-399

SANDRA LITTLE COVINGTON, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

Filed: August 15, 2016

ORDER AND JUDGMENT

For the reasons given in the memorandum opinion entered August 11, 2016, (Doc. 123), it is ORDERED and ADJUDGED that:

1. North Carolina House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107 and Senate Districts 4, 5, 14, 20, 21, 28, 32, 38, and 40 as drawn in 2011 are unconstitutional.
2. The plaintiffs' request to enjoin the November 2016 election is DENIED, but the plaintiff's request for injunctive relief is GRANTED as follows:

a. The State of North Carolina is ordered to redraw new House and Senate district plans;

b. The State of North Carolina is enjoined from conducting any elections for State House and State Senate offices after November 8, 2016, until a new redistricting plan is in place.

3. This judgment is final.

4. The Court retains jurisdiction to enter such orders as may be necessary to enforce this Judgment and to timely remedy the constitutional violation.

This the 15th day of August, 2016

[handwritten: signature]
UNITED STATES DISTRICT JUDGE
For the Court

Appendix C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:15-cv-399

SANDRA LITTLE COVINGTON, et al.,
Plaintiffs,
v.
THE STATE OF NORTH CAROLINA, et al.,
Defendants.

Filed: September 13, 2016

DEFENDANTS' NOTICE OF APPEAL

The Defendants in the above-captioned action hereby give notice of their appeal to the Supreme Court of the United States from the Final Judgment [D.E. 125] entered in this case on August 15, 2016.

This appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted, this the 13th day of September, 2016.

* * *

Counsel for Defendants

* * *

Co-Counsel for Defendants

* * *

Appendix D

No. ___

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, et al.,
Appellants,

v.

SANDRA LITTLE COVINGTON, et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

JURISDICTIONAL STATEMENT

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November 14, 2016

QUESTION PRESENTED

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court invalidated North Carolina's state legislative districting plan under Section 2 of the Voting Rights Act for failure to include majority-minority districts in several regions of the State. In every plan since, the legislature has included majority-minority districts where feasible to ensure that politically cohesive and geographically compact minority groups have an equal opportunity to elect their candidates of choice. Those districts have consistently elected minority-preferred candidates, while districts elsewhere in the State have rarely done so. Based on those election results and a wealth of other evidence confirming the continued reality of racially polarized voting, the legislature in 2011 again included several majority-minority districts in its state legislative redistricting plan. Shortly thereafter, two groups of plaintiffs filed suit in state court challenging most of those districts as unconstitutional racial gerrymanders. The court rejected their claims in full. Dissatisfied, the same individuals and groups that organized and funded the first lawsuit then organized and funded this second lawsuit challenging the same districts on the same grounds. The district court invalidated the plan, holding that the challenged districts were based predominantly on race, and that the legislature lacked good reasons to draw *any* of them as ability-to-elect districts.

The question presented is:

Whether the district court erred by invalidating North Carolina's 2011 state legislative districting plan as an unconstitutional racial gerrymander.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

James Edward Alston; Marshall Ansin; Valencia Applewhite; Marvin Cornelous Arrington; Susan Sandler Campbell; Sandra Little Covington; Mark R. Englander; Viola Ryals Figueroa; Jamal Trevon Fox; Dedreana Irene Freeman; Claude Dorsey Harris, III; Channelle Darlene James; Crystal Graham Johnson; Catherine Wilson Kimel; Herman Benthle Lewis, Jr.; David Lee Mann; Cynthia C. Martin; Vanessa Vivian Martin; Marcus Walter Mayo; Latanta Denishia McCrimmon; Catherine Orel Medlock-Walton; Antoinette Dennis Mingo; Rosa H. Mustafa; Bryan Olshan Perlmutter; Julian Charles Pridgen, Sr.; Milo Pyne; Juanita Rogers; Ruth E. Sloane; Mary Evelyn Thomas; Gregory Keith Tucker; John Raymond Verdejo

Defendants:

The State of North Carolina; North Carolina State Board of Elections; Rhonda K. Amoroso, in her official capacity; Philip E. Berger, in his official capacity; Paul J. Foley, in his official capacity; Joshua B. Howard, in his official capacity; Maja Kricker, in her official capacity; David R. Lewis, in his official capacity; Joshua D. Malcolm, in his official capacity; Timothy K. Moore, in his official capacity; Robert A. Rucho, in his official capacity

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INTRODUCTION

The North Carolina state legislative districts, both Senate and House, invalidated by the decision below were created and enacted as part of the same redistricting cycle as the federal congressional districts at issue in *McCrory v. Harris*, No. 15-1262, in which this Court has already noted probable jurisdiction. And racial gerrymandering challenges to both the state and the federal districts were rejected in the same state court litigation, *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. pending*, No. 16-24. Undeterred by their state-court loss, the backers of the unsuccessful state-court litigation found members of the organizational plaintiffs in the state-court case and funded a second lawsuit in federal court. As in *Harris*, the three-judge federal court essentially ignored the prior state-court decision and reach diametrically opposed conclusions based on the same facts.

On the merits, the court below reached the astonishing conclusion that the legislature had no strong basis in evidence to create majority-minority districts *at all*. Never mind that this Court found a violation of Section 2 of the Voting Rights Act (VRA) based on failure to draw majority-minority districts in many of the same parts of North Carolina in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Never mind that it was common ground among the parties that ability-to-elect districts needed to be drawn, and the principal dispute was only over what kind of districts—majority-minority versus coalition or crossover—should be drawn. Never mind any of that, the district court concluded that the legislature had

no basis to draw VRA-compliant districts at all, and therefore deemed every single one of the challenged districts an impermissible racial gerrymander. And the court did so even though it should not have been applying strict scrutiny in the first place because traditional districting criteria predominated in the design of the challenged districts.

The decision below cannot stand. It grants no deference to the state court's contrary findings; it reflects no appreciation for *Gingles* and the subsequent history of redistricting in North Carolina; and it flatly disregards this Court's admonition that state legislatures cannot be trapped between the competing hazards of liability under the VRA and the Equal Protection Clause. The only difficult question is whether the Court should summarily reverse or note probable jurisdiction, as the decision below is an outlier that cannot stand.

OPINION BELOW

The opinion of the Middle District of North Carolina is reported at 316 F.R.D. 117 and reproduced at App.1-147.

JURISDICTION

The district court issued its judgment on August 15, 2016. Appellants filed their notice of appeal on September 13, 2016. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause and the relevant provisions of the VRA are reproduced at App.151-56.

STATEMENT OF THE CASE

A. Legal Background

State legislative redistricting in North Carolina is subject to an array of oft-conflicting state and federal requirements. First and foremost, "[t]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), meaning that North Carolina must redraw its state legislative districts after each decennial census to ensure continued population equality. N.C. Const. art II, §§3, 5.

In doing so, North Carolina must also comply with the VRA, which requires States to take race into account to avoid violations and, where necessary, to obtain preclearance. For example, Section 2 requires States to draw majority-minority districts where a minority group is "politically cohesive" and "sufficiently large and geographically compact to constitute a majority in a single-member district," and the majority group votes sufficiently "as a bloc" to prevent the minority group from electing its preferred candidate. *Gingles*, 478 U.S. at 50-51. And under Section 5, a covered jurisdiction (which several North Carolina counties were in 2011) cannot draw districts that would lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

But while the legislature must consider race to some degree to comply with the VRA, it simultaneously must comply with the Equal Protection Clause's prohibition on racial

gerrymandering. Strict scrutiny under that Clause applies, however, only if race was "the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district.'" *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1264 (2015). Because of the conflicting demands of the VRA and the Equal Protection Clause, this Court has long assumed that compliance with the VRA is a compelling interest sufficient to satisfy strict scrutiny. *See, e.g., Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 915 (1996). Moreover, to survive strict scrutiny, a State need not prove that its use of race was *necessary* to achieve VRA compliance. *ALBC*, 135 S. Ct. at 1274. Instead, it need only show that it had "good reasons" or a "strong basis in evidence" to fear VRA liability and that the districts it drew are "narrowly tailored" to address the potential violation. *Shaw II*, 517 U.S. at 915.

In addition to balancing those not-always-harmonious federal requirements, the legislature must obey state redistricting law. Most relevant here, the North Carolina Constitution's "Whole County Provision" (WCP) directs that "[n]o county shall be divided" in the formation of a state legislative district. N.C. Const. art. II, §§3(3), 5(3); *See Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003). The WCP reflects "the historical importance of counties as vital 'political subdivisions'" in North Carolina by "establish[ing] a framework to address the neutral redistricting requirement that 'political subdivisions' be respected." *Dickson*, 781 S.E.2d at 412 & n.4.

Taken literally, the WCP would require all state legislative districts to be composed of whole counties. In practice, however, simultaneous compliance with the WCP, the VRA, and one-person, one-vote is impossible. Accordingly, the North Carolina Supreme Court has sought to harmonize the WCP and federal law by "set[ting] forth an enumerated, hierarchical list of steps to guide the enactment of 'any constitutionally valid redistricting plan.'" App.21 (quoting *Stephenson II*, 582 S.E.2d at 250).

The first of those nine steps is that "districts required by the VRA shall be formed prior to creation of non-VRA districts." *Stephenson II*, 582 S.E.2d at 250. This requires the legislature to begin the redistricting process by deciding whether there are areas where race must be considered to avoid a potential VRA violation—*i.e.*, whether there are covered jurisdictions or areas where a "politically cohesive" minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," and where the majority might vote "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. If so, then the legislature must draw districts in those areas first. In doing so, it must form as many single-district, one-county groups as possible; then form as many multi-district, single-county groups as possible; and then use multi-district, multi-county groups for the remaining districts. *Stephenson II*, 582 S.E.2d at 250. After drawing those districts, the legislature must follow the same steps in creating the remaining districts.

B. Factual Background

1. The 2011 Redistricting Process

In early 2011, the legislature selected Senator Bob Rucho as Chair of the Senate Redistricting Committee and Representative David Lewis as Chair of the House Redistricting Committee. App.7-8. Because the North Carolina Supreme Court's interpretation of the WCP required the Chairmen to begin by drawing any districts necessary to avoid VRA violations, they began the process by soliciting input about the extent of racially polarized voting throughout the State, and in particular in covered jurisdictions and areas with significant minority populations. App.21-23. The Chairmen sent letters to numerous individuals and organizations, including the North Carolina NAACP and the University of North Carolina School of Government, requesting information about racially polarized voting, the implications of this Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), and several other matters related to VRA compliance. All members of the Legislative Black Caucus were copied on those letters. Def.Exh.3013-4, 3013-5; Tr.Vol.III at 135-36.

The Chairmen also organized an unprecedented number of public hearings across the State, at which individuals unanimously confirmed that significant racially polarized voting continues. Def.Exh.3013-1. One of those witnesses was Anita Earls, the Executive Director for the Southern Coalition for Social Justice (SCSJ), who now represents plaintiffs in this case. Def.Exh.3013-6 at 6-11. Ms. Earls supplied an expert report prepared by Dr. Ray Block, who had examined election results in North Carolina

and concluded that "non-blacks consistently vote against African-American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates." Def.Exh.3013-8. Ms. Earls testified that the report proved that "we still have very high levels of racially polarized voting throughout the state." Def.Exh.3013-6 at 9-10.

The Chairmen also retained their own expert, Dr. Thomas Brunell, who reviewed and agreed with Dr. Block's findings. He also conducted his own analysis of polarization in 51 counties, including all 40 covered counties and all counties where majority-minority districts were later drawn. He found "statistically significant racially polarized voting in 50 of the 51 counties"; the fifty-first was omitted only because of insufficient data. Def Exh.3033 at 3. At no time during the legislative process did anyone question either expert's conclusions.

The Chairmen then hired Dr. Thomas Hofeller to draw the 2011 maps and gave him three primary instructions. App.8. First, they informed him that the North Carolina Supreme Court's interpretation of the WCP required districts drawn to avoid a VRA violation to be drawn before other districts. App.20-23. Second, they told him that, pursuant to the North Carolina Supreme Court's decision in *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007), and this Court's *Strickland* decision affirming *Pender*, he should endeavor to draw those districts as majority-minority districts. App.19-20. Third, the Chairmen instructed him to attempt to draw majority-minority districts in a number roughly

proportional to the statewide minority population. App.24-29.

Dr. Hofeller "closely followed" those instructions. App.31. He began by identifying regions with "sufficiently populous, compact minority populations" to form "districts containing minority population percentages in excess of 50%." App.32. He then drew an exemplar map creating districts in those regions, without regard to the WCP. *Id.* Next, he created a second exemplar map containing the optimal county groupings under the WCP criteria outlined in *Stephenson*, without regard to the VRA. App.33. Then, because many of the exemplar majority-minority districts were not contained within an optimal county grouping, Dr. Hofeller engaged in a "long, complex, [and] very time-consuming" iterative process to harmonize the two maps "to the maximum extent practicable." Tr.Vol.IV at 240; Tr.Vol.V at 29; *see* App.33. The harmonized map contained 23 majority-minority House districts and nine majority-minority Senate districts, all within the county groupings required by the WCP.

Three groups submitted alternative maps to the legislature. The first plan was prepared by the Alliance for Fair Redistricting and Minority Voting Rights and presented to the legislature by Ms. Earls. App.66-67 n.26. The second plan was submitted by Democratic members of the General Assembly, *see* Def.Exh.3000 at 199; Def.Exh.3001 at 422, and the third was submitted by the Legislative Black Caucus, *see* Def.Exh.3000 at 210; Def.Exh.3001 at 446. All three alternative plans included either majority-minority or coalition districts in roughly the same

regions and counties in which the enacted Senate and House plans included majority-minority districts.

The Chairmen publicly released Dr. Hofeller's harmonized House and Senate maps in July 2011 and, after minor modifications, both were enacted. App.10-11. The maps were then precleared by the Department of Justice, App.11, and were used during the 2012 and 2014 elections.

2. Initial State Court Litigation

In November 2011, two groups of plaintiffs filed suit in North Carolina state court alleging that 27 state legislative districts (including most of the majority-minority districts) and three federal congressional districts were unconstitutional racial gerrymanders. After a two-day bench trial, the three-judge panel unanimously rejected all their claims in a 74-page opinion supported by a 96-page appendix with detailed factual findings. *Dickson v. Rucho*, Nos. 11 CVS 16896, 11 CVS 16940 (N.C. Super. Ct. July 8, 2013). The plaintiffs appealed, and the North Carolina Supreme Court affirmed. *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014). The plaintiffs petitioned this Court for a writ of certiorari, and the Court granted, vacated, and remanded in light of *ALBC*. *Dickson v. Rucho*, 135 S. Ct. 1843 (2015). After further briefing and oral argument, the North Carolina Supreme Court affirmed again. *Dickson*, 781 S.E.2d 404. Plaintiffs' petition for a writ of certiorari from that decision is pending. *Dickson v. Rucho*, No. 16-24.

3. Federal Court Litigation

After the North Carolina Supreme Court's first affirmance in *Dickson*, plaintiffs—organized, funded,

and represented by the same individuals and groups that organized, funded, and represented the state-court plaintiffs—filed suit in the District Court for the Middle District of North Carolina. Like the *Dickson* plaintiffs, they alleged that most of the majority-minority districts in the Senate and House plans were unconstitutional racial gerrymanders. App.13.[1] They did not claim that the legislature should not have taken racial demographics into account *at all* in drawing these districts; instead, they claimed that Section 2 required the legislature to draw fewer majority-minority districts and more coalition districts. The court granted their request for a three-judge district court and, after a five-day bench trial, the district court invalidated the House and Senate plans. App.14.

The court began by disclaiming any suggestion that "the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts." App.3 n.1. Then, in a footnote, it tersely dismissed Appellants' argument that plaintiffs' claims were barred by *res judicata* or collateral estoppel in light of *Dickson*, stating only that "Defendants have not produced sufficient evidence to prove the elements" of one state-law privity doctrine. App.13-14 n.9.

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[1] One of the challenged Senate districts—District 32—is not actually a majority-minority district. App.28. After the legislature concluded that the district could not be drawn as a majority-minority district without violating traditional districting principles, it left the district's BVAP nearly unchanged, increasing only from 42.52% to 42.53%. App.65-66.

Turning to the merits, the court held that "race was the predominant factor motivating the drawing of all challenged districts." App.2. The court then addressed whether the districting legislation was narrowly tailored to serve the State's compelling interest in complying with Sections 2 and 5 of the VRA. App.113-42. The court rejected North Carolina's Section 2 defense, holding that the legislature lacked a strong basis in evidence to draw any of the challenged districts as majority-minority districts. App.121-35. In so holding, however, the court expressly declined to resolve plaintiffs' argument that the legislature should have drawn the districts as coalition districts rather than majority-minority districts. App.18 n.10. Instead, the court held that the legislature "failed to demonstrate a strong basis in evidence for *any* potential Section 2 violation," *id.* (emphasis added), and thus should not have considered race *at all* in drawing the districts. As for Section 5, the court "conclude[d] that Defendants have not put forth a strong basis in evidence that any of [the districts in covered counties] were narrowly tailored to avoid retrogression." App.136.

REASONS FOR NOTING PROBABLE JURISDICTION

According to the decision below, the legislature did not have the requisite "good reasons" for drawing a single ability-to-elect district in the State of North Carolina. Thus, not only did the State lack a compelling interest in drawing majority-minority districts; it lacked a compelling interest in drawing coalition or crossover districts as well. Instead,

according to the district court, the same regions in which this Court *ordered* North Carolina to draw majority-minority districts, and in which DOJ demanded more such districts before granting preclearance, are now so utterly devoid of racially polarized voting that a viable Section 2 claim is no longer even a reasonably likely prospect.

That startling conclusion is both legally and factually indefensible. Indeed, even plaintiffs have never advanced the extraordinary argument that the legislature did not need to draw ability-to-elect districts *at all*. And with good reason, as plaintiffs do not really want the Republican-controlled legislature freed up to re-draw maps without the looming specter of VRA liability. Moreover, a wealth of evidence confirms that the racially polarized voting that unfortunately has plagued much of the State for decades persists. Instead, plaintiffs' only quarrel is with the legislature's decision to draw the challenged districts as majority-minority districts instead of coalition or crossover districts. Yet according to the decision below, the legislature could not intentionally do *either*, because it had no reason to fear VRA liability at all.

That decision is so obviously wrong that it merits summary reversal. Indeed, left standing, it threatens to halt voluntary efforts at compliance with the VRA in their tracks. But that is just the most egregious of the problems with the decision. This case never should been allowed to proceed in the first place, as it was barred by a state-court decision that rejected all the same claims and arguments as to the same districts, and did so at the behest of the same

groups that funded and organized this case. Moreover, even if the case could proceed, plaintiffs failed to meet their demanding burden of proving racial predominance, as they largely ignore the fact that the legislature's assiduous compliance with North Carolina Supreme Court's instructions for reconciling federal and state law ensured that it drew majority-minority districts only in areas where traditional districting criteria supported that endeavor. And in all events, plaintiffs are wrong in their core submission that a State cannot remedy what everyone agrees is a looming Section 2 violation by employing the straightforward and simple solution of drawing a majority-minority district. Accordingly, this Court should summarily reverse or, in the alternative, note probable jurisdiction and correct the outlying decision below.

I. The District Court Erred In Not Deferring To The Earlier-Filed State Court Case Rejecting The Same Claims.

This second-in-time, federal-court case should never have been able to proceed. Before this case was filed, a three-judge panel of the North Carolina state trial court had already decided every relevant legal and factual issue. *See Dickson v. Rucho*, Nos. 11 CVS 16896, 11 CVS 16940 (N.C. Super. Ct. July 8, 2013). In *Dickson*, numerous individuals and organizations brought racial gerrymandering claims identical to those brought here and challenging essentially the same districts challenged here. The trial court considered much of the same evidence presented in this case and rejected those claims in full. Applying the same standards that governed the

decision below, the court found that the legislature had a strong basis in evidence for drawing the challenged districts to avoid a possible Section 2 violation, and that its decision to draw those districts as majority-minority districts was a permissible means of remedying that possible violation. The North Carolina Supreme Court has since affirmed that decision twice, holding that "the enacted House and Senate plans ... satisfy state and federal constitutional and statutory requirements." *Dickson*, 781 S.E.2d at 441. The district court in this case, however, addressed the same claims and reached precisely the opposite conclusion.

As in *Harris*, the *Dickson* case should have foreclosed this follow-on federal case as a matter of claim preclusion and collateral estoppel. Under the doctrine of claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). And "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case" or its privies. *Id.* Where the first court to resolve a claim was a state court, these doctrines "not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 95-96.

There is no question that *Dickson* involved the same claims and issues and was litigated to final

judgment before this suit was filed. Moreover, as in *Harris*, there should not be any serious question about privity: Several plaintiffs here are members of the plaintiff organizations in *Dickson*,[2] and multiple courts have recognized that members of an "organization ... may be bound by the judgment won or lost by their organization," so long as the organization adequately represented their interests and no due process violation results. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003) (emphasis omitted).

Moreover, the same groups that funded and organized the *Dickson* litigation funded and organized this case. The *Dickson* lawsuit was organized and funded by The Democracy Project II, a 501(c)(4) organization formed by Scott Falmlen, the former executive director of the North Carolina Democratic Party. Tr.Vol.V at 135, 139. Many of the individual *Dickson* plaintiffs were affiliated with the North Carolina Democratic Party, including Doug Wilson, who was the Deputy Executive Director of the North Carolina Democratic Party, and Margaret Dickson, who was a Democratic state senator.

Here, too, The Democracy Project II is paying the plaintiffs' legal fees (to the same counsel that represented the *Dickson* plaintiffs). Def.Exh.3118 at ¶3. Falmlen worked closely with members of the North Carolina Democratic Party to formulate the strategy for this lawsuit, and he recruited Wilson and

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[2] *See, e.g.*, Harris Dep. (ECF 77-16) at 18; Rogers Dep. (ECF 77-32) at 31; Covington Dep. (ECF 77-7) at 31-33; Tucker Dep. (ECF 77-11) at 37-38, 42.

Dickson to seek out potential plaintiffs for this case. Def.Exh.3102. They, in turn, ultimately recruited about a dozen of the plaintiffs, none of whom is responsible for legal fees and most of whom admitted that they have no control over this litigation.[3] In short, *Dickson* involved the same claims and sought the same relief; was funded by the same organization; was organized by the same individuals; was litigated by the same counsel; and was filed by plaintiffs who recruited the plaintiffs in this case.

To allow plaintiffs and the organizations behind this litigation to take a second bite at the apple not only would be unfair to the State as a *litigant*, but also would be immensely disrespectful to the State as a *sovereign*, as it would allow a federal court to ignore the factual findings of a co-equal state court. At a bare minimum, concerns for comity and federalism should have led the district court to grant a significant measure of deference to those directly on-point findings, lest plaintiffs circumvent the clear error standard that should apply to any effort to undo those findings. Instead, the court hardly even mentioned the square conflict with *Dickson* that its decision created, let alone attempted to explain how it made flatly contrary factual findings on a nearly identical record.

In all events, the decision below directly conflicts with the state court's findings and conclusions on the exact same issues in *Dickson*. Accordingly, at a minimum, this Court should note probable

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[3] *See, e.g.*, Mustafa Dep. (ECF 77-1) at 67-69; Ansin Dep. (ECF 77-2) at 21, 30-32; Mingo Dep. (ECF 77-4) at 19-20, 31-32.

jurisdiction to resolve the clear split between two co-equal courts applying the same law to the same facts, and yet reaching opposite conclusions.

II. The District Court Erred In Finding That Race Predominated In The Design Of The Challenged Districts.

The decision below is most egregiously wrong for its unprecedented conclusion that the legislature lacked good reasons to draw *any* ability-to-elect districts at all. But the decision is all the more indefensible because the court erred on the threshold question of whether strict scrutiny should apply. This Court has repeatedly explained that strict scrutiny does not apply simply because the legislature sets out to comply with, *inter alia*, the VRA. Rather, challengers must surmount a far more difficult burden to trigger strict scrutiny: They must prove that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

In light of States' need to comply with multiple competing legal obligations, "application of these principles to electoral districting is a most delicate task." *Id.* at 905. Accordingly, this Court has never treated the mere intent to create VRA-compliant districts or majority-minority districts *vel non* as sufficient to trigger strict scrutiny. Instead, the relevant inquiry is not *whether* the legislature created majority-minority districts, but rather *why* and *how* it did so. If it did so to serve explicitly race-based goals, and in defiance of traditional principles, then strict scrutiny applies. *See Miller*, 515 U.S. at

916. But if the legislature created majority-minority districts in pursuit of race-neutral goals, and did so consistent with traditional principles, then its consideration of race does not trigger strict scrutiny.

The district court disregarded that distinction here, failing to recognize that the legislature created majority-minority districts *only* where doing so was consistent with traditional districting principles, and pursuant to a state-court legal regime that expressly incorporates respect for those traditional principles. When the Chairmen instructed Dr. Hofeller to create majority-minority districts, they did not tell him to pursue that goal at all costs. Instead, they instructed him to create majority-minority districts only in areas with "geographically compact" and "politically cohesive" minority populations—in other words, only in areas where traditional principles actually *supported* drawing majority-minority districts. App.9. Likewise, they instructed Dr. Hofeller to comply with the WCP by confining districts to a single county or the minimum grouping of contiguous counties—in other words, to place paramount importance on drawing majority-minority districts that actually complied with state law's "neutral redistricting requirement that political subdivisions be respected." *Dickson*, 781 S.E.2d at 489.

The district court glossed over all of this, instead focusing myopically on the legislature's mere decision to draw majority-minority districts. But the court's own findings and assumptions reveal that the legislature did not pursue that goal at all costs. For instance, the court assumed that the Chairmen "had a strong basis in evidence for the first two *Gingles*

factors regarding each challenged district," App.117, but it failed to realize that those two *Gingles* factors incorporate in significant respects the very traditional districting principles that the court believed were disregarded. If, as the court assumed, each challenged district included a geographically compact and politically cohesive minority group, then including that compact and cohesive community in a single district was fully consistent with traditional principles. Likewise, the court assumed (as the North Carolina Supreme Court held in *Dickson*) that the districts complied with the WCP's requirements as interpreted by *Stephenson*. App.22. But it failed to realize that compliance with state law is itself strong evidence that race did not predominate, and that the WCP furthers the traditional districting principles of "compactness, contiguity, and respect for political subdivisions." *Stephenson I*, 562 S.E.2d at 389; *cf. Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1308 (2016) (finding that "legitimate considerations" predominated where redistricting commission used iterative process to harmonize state law requirements with VRA).

The district court also drew the wrong conclusion from the Chairmen's preliminary goal of providing minority voters with electoral power in proportion to their statewide population. The court viewed that proportionality goal as proof of racial predominance. App.24-31. That is wrong in its own right, *see Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994), but also fails to recognize that the legislature expressly *subordinated* that goal to traditional districting principles. For instance, the Chairmen initially endeavored to create 24 majority-minority

House districts, App.24, but they abandoned that plan upon receiving testimony that minority populations in the southeastern part of the State were not politically cohesive, App.27. Likewise, the Chairmen initially planned to create ten majority-minority Senate districts, but they cast aside that plan when they were unable to identify a tenth region with a "reasonably compact majority African-American population." App.28. In both cases, traditional districting principles prevailed over racial considerations.

The district court's determination that race nonetheless predominated exemplifies the impossible bind that legislatures face when drawing district lines. The Chairmen expressly instructed Dr. Hofeller to draw majority-minority districts *only* where doing so complied with traditional principles and *only* where doing so was required by state and federal law. By reflexively applying strict scrutiny just because majority-minority districts were involved, the district court failed to hold plaintiffs to their "demanding" burden of proving that race "*predominantly* explains [a] District['s] boundaries." *Easley v. Cromartie*, 532 U.S. 234, 241, 243 (2001).

III. The District Court Erred In Holding That The Challenged Districts Did Not Satisfy Strict Scrutiny.

Even assuming strict scrutiny applied, the district court plainly erred in reaching its astounding conclusion that the legislature did not have good reasons for fearing "any potential Section 2 violation," App.18 n.10, and thus should not have considered race *at all*. Even plaintiffs have never

made the extraordinary argument that there is no longer a single region in North Carolina where the legislature must draw ability-to-elect districts. Indeed, plaintiffs surely did not bring this litigation to free up the Republican-controlled legislature to redistrict entirely unconstrained by the VRA. To the contrary, plaintiffs want to further constrain the legislature by forcing it to draw coalition or crossover districts instead of majority-minority districts, which will produce the fully intended side-effect of requiring the Republican-controlled legislature to maximize Democratic partisan advantage. But the district court went far beyond plaintiffs' actual claims and concluded that the legislature lacked good reasons to fear any Section 2 liability *at all*, and thus lacked good reasons to draw *either* majority-minority *or* coalition or crossover districts in any of the regions that have had one or the other for decades. App.2.

That extreme outlier decision is so erroneous as to warrant summary reversal. Not only does it threaten to halt voluntarily efforts at VRA compliance in their tracks; it also reflects a fundamental misunderstanding of the law and an unsupportable analysis of the record. And plaintiffs fare no better with the argument they *actually* made, as the legislature's decision to address the obvious potential Section 2 violations by aiming to draw majority-minority districts was fully consistent with, if not compelled by, this Court's decision in *Strickland*.

A. States Are Entitled to Leeway in Deciding Whether and How to Draw Ability-To-Elect Districts.

Even when strict scrutiny applies to districting legislation, the legislation will still be upheld if it was "narrowly tailored to serve a compelling state interest." *Shaw II*, 517 U.S. at 902. Evaluating whether a districting plan is narrowly tailored to further the State's interest in complying with the VRA[4] entails a two-part inquiry: (1) whether the State had good reasons to fear VRA liability if it did not consider racial composition; and, if so, (2) whether the district the State drew was an appropriate means of remedying the potential violation. *Id.* at 915-16.

The two distinct prongs of this inquiry are clear from *Shaw II*, in which this Court assumed arguendo that the legislature had "a strong basis in evidence" to believe that consideration of race "was needed in order not to violate §2," but nonetheless held that the challenged plan "does not survive strict scrutiny" because it was not an appropriate means to serve "the asserted end." *Id.* at 915; *see also Bush v. Vera*, 517 U.S. 952, 978-79 (1996) ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for §2 liability are present ... [and] the district drawn in order to satisfy §2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid §2 liability."); *cf. Wygant v.*

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[4] This Court has repeatedly assumed that compliance with the VRA is a compelling interest, *see, e.g., Shaw II*, 517 U.S. at 915, and the district court correctly did the same here.

Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986) (a State must have "evidence that remedial action is warranted" and must select a "legally appropriate" remedy).

At both steps of the inquiry, States engaged in good-faith efforts to comply with the VRA are entitled to substantial leeway. *Vera*, 517 U.S. at 977. At the first step, a State need not prove that it *certainly* would have violated the VRA had it not considered race. *See ALBC*, 135 S. Ct. at 1274. Instead, it need show merely that it had "good reasons" or a "strong basis in evidence" to believe that preclearance would have been denied, or that a hypothetical plaintiff could have established the preconditions to a Section 2 claim, had the State not done so. *Id.* Likewise, at the second step, a State need not "determine *precisely* what percent minority population" the VRA requires in a district. *Id.* at 1273. Rather, districts are narrowly tailored so long as they "substantially address" the potential statutory violation. *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 977. And when a legislature sets out to address a potential Section 2 violation, "the best way to avoid suit under §2" is by creating a district in which the minority group composes a majority of voters. *Strickland*, 556 U.S. at 43 (Souter J., dissenting).

B. The District Court Erred in Holding That the Legislature Lacked Good Reasons to Draw Any Ability-To-Elect Districts.

The North Carolina legislature had exceedingly good reasons to maintain ability-to-elect districts in the same counties and regions in which they have

appeared for decades. Indeed, plaintiffs have never suggested otherwise. Plaintiffs did not allege that the legislature should have drawn its districts without *any* consideration of race, and they never denied that the legislature would have been vulnerable to VRA liability if it eliminated the pre-existing ability-to-elect districts. Plaintiffs instead took issue with the legislature's decision to draw those districts as majority-minority districts instead of as coalition districts. They are mistaken, but the district court erred even more fundamentally in reaching its remarkable conclusion that the legislature lacked "good reasons" to draw any ability-to-elect districts in the first place.

1. The legislature had good reasons to include ability-to-elect districts.

The three preconditions to a Section 2 claim are: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive"; and (3) the white majority votes "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. These latter two requirements are often discussed in tandem, under the rubric of "racially polarized voting." *See, e.g., League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 427 (2006). When minority voters cohesively vote one way and majority voters cohesively vote the other way, a sufficiently large group of majority voters may be able to thwart the minority group's efforts to elect its preferred candidates.

There is no question that the first factor was satisfied here, as all of the challenged districts were drawn as single-member, majority-minority districts that complied with the WCP to the greatest extent possible. As to the remaining two factors, the Chairmen had more than enough evidence of racially polarized voting to justify their conclusion that Section 2 continued to require ability-to-elect districts in the same counties and regions in which they had long appeared.

At the outset, the Chairmen were not working from a blank slate in determining whether and where a VRA violation was reasonably likely. The State has faced both Section 2 liability and Section 5 objections for failure to draw majority-minority districts multiple times over the past three decades. In *Gingles*, North Carolina was *ordered* to create majority-minority districts in 13 different counties to remedy fully adjudicated Section 2 violations. *Gingles v. Edmisten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984), *aff'd Gingles*, 478 U.S. at 80. The legislature complied with that order and then, in the 1991 redistricting cycle, preserved all of those districts and added four more majority-minority House districts and two more majority-minority Senate districts. Def.Exh.3021. After a Section 5 objection from the Attorney General in 1991, the legislature added three more majority-minority House districts. Def.Exh.3022.

In 2001 the legislature enacted a similar set of ability-to-elect districts, using a combination of majority-minority, coalition, and crossover districts to comply with Section 2. Def.Exh.3023. The 2001

plans were invalidated on state law grounds, *Stephenson I*, 562 S.E.2d 377, so the legislature enacted new plans in 2003. Those plans also included a combination of majority-minority, coalition, and crossover districts. Def.Exh.3024. Using 2010 Census numbers, the 2003 House plan included 24 ability-to-elect districts that were either majority-minority or coalition districts, Def.Exh.3018-39, and the 2003 Senate plan included ten ability-to-elect districts, all of which were coalition districts, Def.Exh.3018-34.

Working against this backdrop, and required by *Stephenson* to create districts necessary to avoid possible VRA violations before creating other districts, the Chairmen began the 2011 redistricting process by evaluating whether significant racially polarized voting still existed in the areas that had traditionally supported majority-minority or coalition districts. Every single piece of evidence confirmed that it did. That included two expert reports—one commissioned by SCSJ and one commissioned by the General Assembly itself—that found consistently high levels of racially polarized voting. Dr. Block, the SCSJ's expert, examined election results for 54 congressional and legislative elections between a white candidate and a black candidate in 2006, 2008, and 2010—including in almost every majority-minority or coalition district in the benchmark plan. He concluded that "non-blacks consistently vote against African-American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates." Def.Exh.3013-8 at 1. Dr. Block also found a "consistent relationship between the race of a voter and the way in which s/he votes."

Id. at 3. According to the executive director of the SCSJ—who is counsel for the plaintiffs in this case—Dr. Block's study "demonstrate[d] the continued need for majority-minority districts." Def.Exh.3013-7 at 2.

The General Assembly's own expert, Dr. Brunell, reviewed and agreed with Dr. Block's findings. *See* Def.Exh.3033. Dr. Brunell also conducted his own analysis, focusing on polarization at the county level. He studied the results of several federal, state, and local elections, including the 2008 Democratic Presidential primary, the 2008 Presidential election, and the 2004 General Election for State Auditor (the only statewide partisan election between a black and a white candidate). *Id.* His study estimated both the proportion of black voters that can be expected to favor a black candidate and the proportion of white voters that can be expected to favor a white candidate. Dr. Brunell found "statistically significant racially polarized voting in 50 of the 51 counties" he studied, including all 40 covered counties and every county in which the 2011 plan included a majority-minority or coalition district. *Id.* at 3. Not a single legislator, witness, or expert questioned the findings of either expert during the legislative process.

The Chairmen also organized an unprecedented number of public hearings, at which individuals from across the State confirmed that racially polarized voting remains prevalent in North Carolina. The executive director of Democracy North Carolina testified that race must be considered in the redistricting process and that discrimination and racially polarized voting continues in much of the State. A member of the League of Women Voters told

the committee that race should be considered when drawing districts and that the legislature must not "weaken" the minority vote. The president of the Pasquotank County NAACP testified that the existing majority-minority districts should be preserved and that additional majority-minority districts should be drawn. *See* Def.Exh.3015A at 9-13, 29-30, 62.

The Chairmen also reviewed election results over the previous decade. Those results revealed a clear pattern: While minority-preferred candidates had substantial success in majority-minority and coalition districts, they had almost no success in majority-white districts. In 2010, for instance, *all* 18 African-American candidates elected to the House and *all* seven African-American candidates elected to the Senate were from ability-to-elect districts. Not a single African-American candidate was elected in 2010 from a majority-white district. Def.Exhs.3016-6, 3016-7. Previous elections were similar. From 2004 to 2008, for example, African-American candidates ran for a House seat 23 times in majority-white districts and won only three times. Def.Exh.3020-7. Those results were consistent with the results of statewide elections: From 2002 through 2010, no African-American candidate was elected to state office in a statewide partisan election. Def.Exh.3043.

Throughout the redistricting process, not a single individual or organization argued that North Carolina's long history of racial polarization had vanished or that the legislature should eschew all consideration of race in drawing its districts. In fact,

all three of the alternative plans that were submitted during the redistricting process—including one submitted on behalf of SCSJ by counsel for plaintiffs in this case—included either majority-minority or coalition districts in essentially the same regions as the 2011 plan. *See* Def.Exh.3000 at 166, 169, 188, 191, 199, 202, 210, 213.

With all that information, the Chairmen reached the only reasonable conclusion: that the 2011 state legislative plans should continue to include the ability-to-elect districts that had existed in previous plans. In light of the Section 2 violations found in *Gingles*; the lack of electoral success for minority candidates in majority-white districts; the expert reports finding significant racially polarized voting throughout the State; the testimony from numerous individuals and organizations in support of ability-to-elect districts; and the three alternative plans submitted to the legislature, the Chairmen had the requisite strong basis in evidence to fear that minority voters would experience vote dilution if the 2011 plans abandoned ability-to-elect districts.[5]

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[5] That evidence also strongly supported the conclusion that several districts had to be drawn as majority-minority districts to avoid a potential Section 5 violation, as several of the 40 then-covered counties were part of districts that already were majority-minority districts under the benchmark plan. *See* Def.Exh.3018-15. The district court thus also erred in rejecting the State's Section 5 defense.

2. The district court erred in holding that the legislature lacked good reasons to fear Section 2 liability.

Notwithstanding this wealth of evidence, the district court concluded that the State failed to satisfy strict scrutiny. The court did not reach that conclusion for the reasons plaintiffs pressed; in fact, the court expressly declined to decide whether drawing majority-minority districts was a permissible means of remedying the looming Section 2 violations. App.18 n.10. Instead, the court went beyond anything plaintiffs ever argued and held that the legislature "failed to demonstrate a strong basis in evidence for *any* potential Section 2 violation" *at all*. *Id.* (emphasis added). In effect, then, the court's decision precludes the legislature not only from drawing majority-minority districts, but also from drawing coalition or crossover districts, anywhere in the State—even though plaintiffs concede that the State was all but certain to face Section 2 claims if it followed that course.

The court based that remarkable holding on the third *Gingles* factor, concluding that the State "failed to demonstrate that, for any challenged district," racially polarized voting "would enable the majority usually to defeat the minority group's candidate of choice." App.117. That conclusion is inexplicable. As just detailed, the legislature received uncontradicted evidence confirming the existence of racially polarized voting in all of the regions in which ability-to-elect districts had long appeared. That evidence would have sufficed to prove that racially polarized voting *actually* exists, and it plainly

sufficed to prove that the legislature had a "strong basis" for reaching that conclusion.

The district court nonetheless believed that there was no longer any prospect of a Section 2 violation because "African-American candidates were elected in 2004, 2006, 2008 and 2010 ... in benchmark Senate Districts 4, 14, 20, 28, 38 and 40 and benchmark House Districts 5, 12, 21, 29, 31, 42 and 48." App.130. But every single one of those districts was consciously drawn as a coalition district under the benchmark plan. Def.Exhs.3018-34, 3018-39. It is precisely because past legislatures took that step that minority groups have been able to elect their candidates of choice. Requiring the legislature to eliminate those districts because they have been performing as designed "is like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting).

Moreover, the relevant question is not whether *earlier* versions of the districts violated the VRA; it is whether the State had good reasons for believing that drawing *new* districts without regard to race would have given rise to *future* VRA liability. *Cf. Perry v. Perez*, 132 S. Ct. 934, 941 (2012) ("In areas where population shifts are so large that no semblance of the existing plan's district lines can be used, [a previous] plan offers little guidance."). The right question for the legislature, then, was: If the districts were drawn based solely on the optimum county grouping criteria under the WCP, would the resulting districts have violated Section 2?

The answer was plainly yes. Indeed, Dr. Hofeller created that exact map, using it as the "starting point from which [he engaged] in the harmonization process between the VRA districts and the county groupings." Tr.Vol.V at 25-26. On that map, all but two of the optimum county groupings for House districts were majority-white, Def.Exh.3030 at 44-48, and all but three of the groupings for Senate districts were majority-white, *id.* at 49-53. Had districts been drawn in those groupings without regard to race, hardly any of them would have avoided a potential Section 2 violation (let alone survived preclearance), especially given the dismal electoral results under the benchmark plan for minority-preferred candidates running in majority-white districts. Def.Exhs.3020-7, 3043; Tr.Vol.V at 121-22.

Perhaps recognizing this, the court suggested that the legislature did not need to draw the pre-existing *coalition* districts as *majority-minority* districts. App.131-32. But that question—whether the legislature's use of majority-minority districts instead of coalition districts was permissible—is entirely separate from the one on which the court purported to rule. The court expressly *reserved* the question of whether the legislature retained the flexibility to choose majority-minority districts rather than crossover districts as its prophylactic remedy for potential VRA problems, instead purporting to address only whether the legislature had a reasonable fear of "a potential Section 2 violation" at all. App.18 n.10. As to that question, the relevant comparison is not between a coalition district and a majority-minority district, but between a district drawn without *any* consideration of race and a

district consciously designed to achieve VRA compliance. By improperly conflating the two prongs of the narrow-tailoring inquiry, the court arrived at the utterly indefensible conclusion that the legislature cannot even *consider* racial demographics in regions where it had previously been *ordered* to draw majority-minority districts.

The court also levied a series of unconvincing criticisms at the expert reports on which the Chairmen relied, faulting those reports for studying "statistically significant" instead of "legally significant" racially polarized voting. App.124-25. In the court's view, polarization could be "statistically significant" even where "there is only a 'minimal degree of polarization,' such as when 51% of a minority group's voters prefer a candidate and 49% of the majority group's voters prefer that same candidate." App.125. Setting aside whether that is correct as a statistical matter, the racially polarized voting in North Carolina bears no resemblance to the hypothetical. Dr. Brunell's report estimated that in the average county in the relevant districts, less than 30% of white voters supported the minority-preferred candidate in the 2008 Democratic presidential primary, compared to approximately 90% of black voters. Def.Exh.3033 at 5-8. Those percentages are even worse than those that led this Court to find a Section 2 violation in *Gingles*, 478 U.S. at 59. It would have been irresponsible for the legislature to look at that data and conclude that all risk of a Section 2 violation had evaporated.

Indeed, if the Chairmen had eliminated the ability-to-elect districts entirely (yet somehow

managed to obtained preclearance), there is no doubt that a Section 2 lawsuit would have followed. And the Chairmen would have lacked any basis on which to justify their abandonment of ability-to-elect districts that were included in every alternative map; were supported by two expert reports; were endorsed by every witness who testified during the legislative process; and were the only districts in which minority-preferred candidates achieved sustained electoral success under the benchmark plan. And while it might be tempting for the legislature to simply accept the three-judge court's unexpected conclusion and declare itself free from any need to comply with the VRA, that path would be irresponsible. Not only do state legislators take an oath to uphold the Constitution and laws of the United States, but the three-judge panel's conclusion would be non-binding and indefensible in any court where the inevitable Section 2 lawsuit followed. The district court's decision thus places North Carolina in precisely the untenable position that this Court has sought to avoid: "trapped between the competing hazards of liability" under the VRA and the Constitution. *Vera*, 517 U.S. at 977.

C. The Legislature's Decision to Draw Majority-Minority Districts Was a Permissible and Narrowly Tailored Means of Avoiding the Looming Section 2 Claims.

At a minimum, the decision below should be summarily reversed for its astounding holding that the legislature lacked good reasons to fear *any* Section 2 liability at all. But the Court should note

probable jurisdiction to consider (and reject) the argument that plaintiffs *actually* made—*i.e.*, that Section 2 required the legislature to draw the challenged districts as coalition or crossover districts instead of majority-minority districts. In fact, the legislature's decision to avert the looming Section 2 violations by drawing majority-minority districts was entirely permissible under, if not compelled by, this Court's decision in *Strickland*.

Strickland, like this case, involved the interplay of the WCP and the VRA. The plaintiffs alleged that the North Carolina legislature violated the WCP by splitting portions of a county. *Strickland*, 556 U.S. at 8. The legislature claimed that federal law compelled it to violate that state-law command, arguing that "[f]ailure to do so ... would have diluted the minority group's voting strength in violation of §2" because the resulting district would have had a BVAP of 35.33% instead of 39.36%. *Id.* The question before this Court was whether Section 2 can require a State to draw a crossover district when a minority group is "not sufficiently large to constitute a majority" in a single district. *Id.* at 12.

This Court answered that question in the negative. According to the plurality opinion, Section 2 provides a remedy only to "a geographically compact group of minority voters [that] could form a *majority* in a single-member district." *Id.* at 26 (emphasis added). That bright-line rule was rooted "in the need for workable standards and sound judicial and legislative administration." *Id.* at 17. Allowing Section 2 claims to proceed when a minority group composes something less than a numerical

majority "would place courts in the untenable position" of "determining whether potential districts could function as crossover districts," which would require "elusive" answers to a whole host of "speculative" questions. *Id.* In contrast, "the majority-minority rule relies on an objective, numerical test," and it "provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with §2." *Id.* at 18.

From the outset of the 2011 redistricting process, the Chairmen recognized that *Strickland* gives States clear guidance on how best to avoid a potential Section 2 violation: draw a majority-minority district. While a coalition or crossover district *might* suffice, making that determination involves inquires far too speculative to assess prospectively with any real degree of certainty. And while a legislature may have good reasons to believe that a BVAP of 46% would avoid vote dilution, if it proves mistaken, its good-faith basis for choosing 46% instead of 50% may not save it from the inevitable Section 2 claim. Accordingly, the best way a legislature can be sure that it is avoiding a Section 2 violation in a region where the *Gingles* factors are satisfied is by drawing a district in which the "minority group composes a numerical, working majority of the voting-age population." *Id.* at 13.

Indeed, that is arguably the *only* way to avoid a Section 2 violation given *Strickland*'s holding that "§2 does not mandate creating or preserving crossover districts." *Id.* at 23 (plurality opinion); *see also id.* at 43 (Souter, J., dissenting). After all, if coalition and crossover districts are not available

remedies for an *actual* Section 2 violation, then it is not obvious that they can be used as prophylactic remedies for a *potential* Section 2 violation.[6] But even if *Strickland* does not *compel* States to address potential Section 2 violations by drawing majority-minority districts, surely it at least entitles States to select that option as the safest course.

Accordingly, where, as here, there is no real dispute (at least by the parties) that Section 2 required *some* prophylactic measure on the State's part, the State should be free to select the logical option of targeting a BVAP of at least 50%-plus-one. Any other conclusion would put States in the impossible position of being condemned for "unconstitutional racial gerrymandering should [they] place a few too many minority voters in a district," but condemned under the VRA should they "place a few too few." *ALBC*, 135 S. Ct. at 1274. This Court thus should reject again, as it has done before, plaintiffs' untenable contention that States must "determine *precisely* what percent minority population" would best enable to minorities to elect their candidate of choice. *Id.* at 1273.

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[6] The North Carolina Supreme Court reached that conclusion in the decision this Court affirmed in *Strickland*, holding that "when a district must be created pursuant to Section 2, it must be a majority-minority district." *Pender*, 649 S.E.2d at 372.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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November 14, 2016

Appendix E

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:15-cv-399

SANDRA LITTLE COVINGTON, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

Filed: November 29, 2016

ORDER

With this lawsuit, filed in May 2015, the plaintiffs, individual North Carolina citizens, challenged the constitutionality of nine state Senate districts and nineteen state House of Representatives districts "as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." First Am. Compl. ¶ 1, ECF No. 11. In an opinion filed on August 11, 2016, this Court held that the challenged House and Senate Districts as drawn in 2011 were unconstitutional and, without imposing a deadline, directed the legislature to draw new districts. Mem. Op., ECF No. 123; Order and J., ECF No. 125.

Because the Court's Order finding racial gerrymandering was entered on the eve of the November 2016 regular election, the Court determined that the 2016 election should proceed under the unconstitutional districts. Mem. Op., 160-63, ECF No. 123. The Court enjoined the defendants from conducting any elections using the unconstitutional districts after November 2016. Mem. Op., ECF No. 123; Order and J., ECF No. 125.

The plaintiffs ask the Court to establish a deadline of January 25, 2017, for the legislature to pass legislation establishing new districts and to order a special election in 2017 using those districts, while the defendants ask the Court to allow the legislators elected in the unconstitutional districts to continue to hold office until 2018. The Court ordered supplemental briefing, Order, ECF No. 124, which is now complete.

The Court earlier concluded that the challenged districts violate the equal protection rights of the plaintiffs and other voters and that the plaintiffs are "entitled to swift injunctive relief." Mem. Op. 163, ECF No. 123. The Court has the authority to shorten the term of existing legislators, order special elections, and alter the residency requirements for those elections, because "[i]t is fundamental that state limitations—whether constitutional, statutory or decisional—cannot bar or delay relief required by the federal constitution." *Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1965) (per curiam); *see also Smith v. Beasley*, 946 F. Supp. 1174, 1212-13 (D.S.C. 1996).

While special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander. The Court recognizes that special elections typically do not have the same level of voter turnout as regularly scheduled elections, but it appears that a special election here could be held at the same time as many municipal elections, which should increase turnout and reduce costs. A special election in the fall of 2017 is an appropriate remedy.

The plaintiffs contend that the deadline for the General Assembly to draw remedial districts should be January 25, 2017. Mem. in Supp. of Pls.' Mot. for Additional Relief 2, ECF No. 133. The defendants contend that the deadline should be May 1, 2017. Defs.' Mem. in Opp'n to Pls.' Mot. for Additional Relief 2, ECF No. 136.

To the extent that the defendants' argument is based on the fact that the plaintiffs' proposed schedule would only give the State two weeks to draw new districts, we reject that argument. This Court's order finding the current districts unconstitutional was entered on August 15, 2016, and the State has already had over three months to work on a redistricting plan. Nothing has prevented the State from holding hearings, commissioning studies, developing evidence, and asking experts to draw proposed new districts over this three month period. Indeed, nothing prevented the current legislature from complying with the Court's order to redistrict.

Nevertheless, the current legislature has apparently decided not to redistrict and to leave that task to the legislators just elected under the unconstitutional racial gerrymander, who will come into office in mid-January 2017. *See* N.C. Gen. Stat. § 120-11.1. Although the new legislature might ordinarily be able to accomplish redistricting in two weeks, we are sensitive to the defendants' concern that the large number of districts found to be racial gerrymanders will render the redistricting process somewhat more time-consuming.

That being said, the State's proposed schedule does not build in any time for the Court to make changes should the State's new districts be inadequate to remedy the constitutional violation. Under the State's proposed schedule, the State will have some eight and a half months to redistrict, the plaintiffs will then have seven days to review the new districts and object, and the Court will have only a few days to review the districts and any objections before the Board of Elections needs to begin the work necessary to hold elections in the fall.

The Court concludes that March 15, 2017, is a reasonable deadline for allowing the State the opportunity to draw new districts. This gives the State a total of seven months from the time the districts were held to be unconstitutional, which is longer than it took the 2011 legislature to redistrict the entire state; even if all the work is done by the newly elected legislature, they will have some six weeks to accomplish the task. This schedule also will allow the Court enough time to consider whether the

State has remedied its unconstitutional gerrymander and to act if it does not.

Finally, the plaintiffs ask that the defendants provide the Court and the plaintiffs with the information needed to evaluate the constitutionality of the new districts. See Pls.' Mot. for Additional Relief, ECF No. 132 ¶ 3. The defendants have not objected. See Defs.' Mem. in Opp'n, ECF No. 136.

It is ORDERED that:

1. The General Assembly of the State of North Carolina is given the opportunity to draw new House and Senate district plans for North Carolina House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107; and Senate Districts 4, 5, 14, 20, 21, 28, 32, 38, and 40, through and until 5 p.m. on March 15, 2017. The defendants shall file the new maps with the Court within seven days of passage.

2. Within seven days of passage, the defendants also shall file:

   a. transcripts of all committee hearings and floor debates;

   b. the "stat pack" for the enacted plans;

   c. a description of the process the General Assembly followed in enacting the new plans, including the identity of all participants involved in the process;

   d. the criteria the General Assembly applied in drawing the districts in the new plans, including the extent to which race was a factor in drawing any district in which the

black voting-age population (BVAP) is greater than 50%; and

e. as to any district intentionally drawn with a BVAP greater than 50%, the factual basis upon which the General Assembly concluded that the VRA obligated it to draw the district at greater than 50% BVAP.

3. The plaintiffs may file any objections within seven days of the filing of the redistricting plan with the Court. The defendants may respond seven days thereafter.

4. If the State fails to redistrict by March 15, 2017, the plaintiffs may file a proposed redistricting plan no later than March 17, 2017.

5. The term of any legislator elected in 2016 and serving in a House or Senate district modified by the General Assembly under the redistricting plan shall be shortened to one year.

6. Any citizen having established their residence in a House or Senate district modified by the General Assembly under the redistricting plan as of the closing day of the filing period for the 2017 special election in that district shall be qualified to serve as Senator or Representative if elected to that office notwithstanding the requirement of Sections 6 and 7 of Article II of the North Carolina Constitution, which provides that each Senator and Representative, at the time of their election, shall have resided "in the district for which he is chosen for one year immediately preceding his election."

7. The State of North Carolina shall hold special primary and general elections in the fall of 2017, for the purpose of electing new legislators in these districts and such other districts which are redrawn in order to comply with Paragraph 1. The primary shall be held in late August or early September and the general election shall be held in early November, the specific dates to be determined by the legislature or, should the legislature fail to act, by this Court. Legislators so elected shall take office on January 2, 2017, and each legislator shall serve a one year term.

This 29th day of November, 2016.

/s/ James A. Wynn, Jr.

/s/ Thomas D. Schroeder

/s/ Catherine C. Eagles

Appendix F

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:15-cv-399

SANDRA LITTLE COVINGTON, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

Filed: December 22, 2016

DEFENDANTS' NOTICE OF APPEAL

The Defendants in the above-captioned action hereby give notice of their appeal to the Supreme Court of the United States from the order [D.E. 140] entered in this case on 29 November 2016.

This appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted, this the 22nd day of December, 2016.

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Co-counsel for Defendants

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Counsel for Defendants

* * *

Appendix G

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any

State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix H

Relevant Statutory Provisions Involved

52 U.S.C. § 10301

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10304

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in

section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification,

prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have

the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

RECORD AND BRIEFS.

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SUPREME COURT, U.S.

No. 16-1023

IN THE

Supreme Court of the United States

STATE OF NORTH CAROLINA, *ET AL.*,
Appellants,
v.
SANDRA LITTLE COVINGTON, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

MOTION TO AFFIRM

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RESTATEMENT OF QUESTIONS PRESENTED

A unanimous, three-judge district court concluded that the North Carolina General Assembly racially gerrymandered twenty-eight legislative districts in violation of the Equal Protection Clause. Although the timing of the court's opinion did not permit redrawing the districts in time for the 2016 elections, the court enjoined any further use of the districts and expressly retained jurisdiction to enter any order necessary to timely remedy the egregious constitutional violation, including by ordering special elections. After supplemental briefing in which no party suggested that the court lacked jurisdiction to enter a remedial order, the court, in a well-reasoned opinion, unanimously ordered that special elections be held in 2017 pursuant to constitutionally drawn districts.

The questions presented are:

1. Did the district court properly retain jurisdiction to enter a final remedy, having expressly noted it was doing so?

2. Did the district court act within its broad and flexible discretion in fashioning appropriate equitable relief to remedy the State's egregious racial gerrymandering?

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INTRODUCTION

It is unremarkable, black-letter law that district courts enjoy broad discretion in fashioning equitable remedies for constitutional violations, and that this discretion is at its apex in cases involving the public interest. This is just such a case. In 2011, the North Carolina General Assembly enacted state legislative districts using explicit racial quotas. The end result was a series of Rorschach-like districts based predominantly on race and not on any traditional redistricting criteria. Although Appellants (the "State") claimed that the mechanical use of racial targets was necessary to avoid liability under the Voting Rights Act ("VRA"), the three-judge district court easily found that the State lacked a strong basis in evidence to believe such actions were in fact necessary. Applying this Court's well-established precedents, the court unanimously concluded that twenty-eight of the State's districts were unconstitutional racial gerrymanders.

At the time the district court ruled the challenged districts unconstitutional, the maps had already imposed harms on North Carolina voters for two election cycles. However, because the machinery for the decade's third election cycle was already in motion at the time of the court's opinion, the court "regrettably conclude[d]" that it was unable to order new districts in time for the November 2016 elections. J.S. App. 143. Thus, it enjoined the use of the maps only for elections held after November 2016. The court emphasized, however, that the voters were entitled to swift injunctive relief, and, accordingly, stated that it was retaining jurisdiction to enter any orders necessary to

timely remedy the constitutional violation. The court then ordered the parties to brief whether additional relief should be provided prior to the 2018 elections. Following this briefing, the court weighed the equities and unanimously determined that special elections should be held in 2017 to remedy the constitutional violations.

The State's argument that the court lacked jurisdiction to order special elections is unsupported by either the facts or the law. Equally meritless is the State's argument that the district court wildly abused its discretion and acted without precedent in ordering special elections. The court had extensive evidence before it about the nature of the harms to North Carolina voters, as well as the administration of state elections. Its decision to order special elections was well-considered and in no way unprecedented. Importantly, the question presented by this appeal is not what remedy this Court would have chosen, but whether the district court abused its discretion in ordering a prompt cure for the extensive and blatant constitutional violations. It did not, and the remedial order should therefore be summarily affirmed.

The timing of the Court's consideration of this appeal is critical. While Appellees believe the decision below should be summarily affirmed, should the Court decline to take that path, Appellees respectfully request that the Court note probable jurisdiction and order expedited briefing and argument so that the appeal can be decided by the end of this Term. If the Court does not summarily affirm or proceed on an expedited basis, the State will be able to moot the relief

Appellees obtained simply by running out the clock with this appeal.

STATEMENT OF FACTS

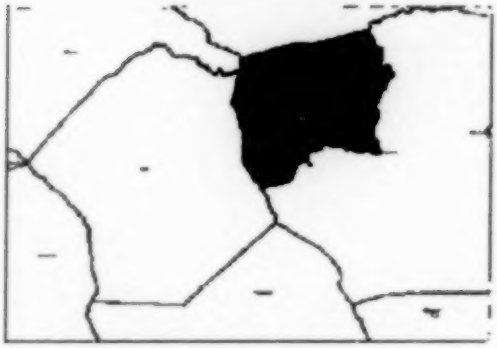
A. The Redistricting Process

At the time of the 2011 redistricting in North Carolina, twenty-five years had passed since this Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), which found that North Carolina had violated Section 2 of the VRA. During the intervening decades, there had been no Section 2 challenges to state legislative districts, and no liability for vote dilution established in any redistricting case. The number of majority-black legislative districts in the state was decreasing, while the number of African-American legislators in the General Assembly was increasing. J.S. App. 6-7; Dkt. 109 at 47-48. In fact, data readily available at the time of redistricting, J.S. App. 7, showed that in the three election cycles immediately preceding the 2011 redistricting, "African-American candidates for the North Carolina House won thirty-nine general elections in districts without a majority BVAP [black voting age population] (including eleven such elections in 2010 alone), and African-American candidates for the North Carolina Senate won twenty-four such elections (including seven such elections in 2010)." J.S. App. 7.

Despite the fact that the data clearly showed there was no need to create majority-minority districts to elect minority candidates of choice, the North Carolina legislature's Redistricting Chairs, Senator Robert Rucho and Representative David Lewis, instructed their consultant, Dr. Thomas Hofeller, to do just that. At the outset of the process, Dr. Hofeller was

instructed to draw a racially proportionate number of majority black voting age population ("BVAP") districts for the state house and senate, each at greater than 50% BVAP, and to prioritize drawing the racially designed districts before drawing any others. J.S. App. 9-10, 22. As a result, the number of majority-black state house districts rose from nine to twenty-three, while the number of majority-black state senate districts rose from zero to nine. J.S. App. 6-7, 28. This was accomplished by creating bizarrely shaped districts with finger-like borders that reach out to capture black residents, while avoiding white residents. Shown below are two such examples, Senate Districts 21 and 14:

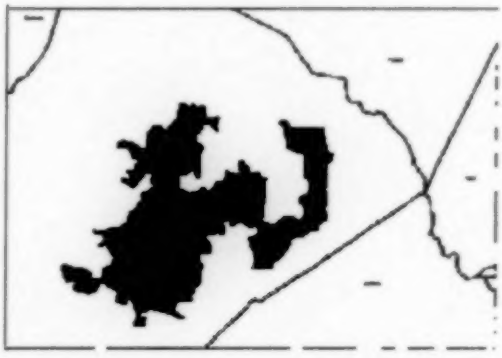
Benchmark SD 21



Enacted SD 21

Benchmark SD 14

Enacted SD 14



Dr. Hofeller began the task of redistricting by preparing a racial proportionality chart to determine

how many majority-black districts would be needed to satisfy the Redistricting Chairs' racial targets. J.S. App. 31-32. By his own admission, he then proceeded to draw majority-black districts "without reference to any communities of interest or geographic subdivisions, such as county lines and precinct lines." J.S. App. 32. Dr. Hofeller set out to meet these racial targets without reference to any racially polarized voting study—the type needed to demonstrate risk of liability under Section 2 of the VRA. Dkt. 119 at 80-82.[1]

In creating these districts, Dr. Hofeller split counties, cities, towns, and precincts along racial lines, placing black voters in the challenged districts and avoiding white voters so as to include them in adjoining districts. J.S. App. 34-35, 37-38. As illustrated above, the resulting districts are oddly shaped and non-compact, whether measured visually or quantitatively. J.S. App. 39-40. Racial density maps for each challenged district reveal the purpose of the bizarre lines: to exclude largely white communities and include largely black communities in order to attain Senator Rucho and Representative Lewis's racial targets. J.S. App. 47-48, 49-113.

During the legislative debates about the maps, several African-American legislators questioned why

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[1] The State incorrectly claims that the Redistricting Chairs "began the 2011 redistricting process by collecting evidence about the extent of racially polarized voting." J.S. 4. In fact, by his own admission, Dr. Hofeller drew the challenged districts without reference to any information about the extent of racially polarized voting. Dkt. 119 at 80-82.

increasing the BVAP in the challenged districts to 50% or greater was necessary to allow African-American voters an equal opportunity to elect their candidates of choice, given that in recent history there had been "no problem" electing African-American voters' candidates of choice in districts that were not majority-minority districts. J.S. App. 131-32. For example, in the two districts pictured above, the black candidates' margin of victory in SD 14 in the five elections between 2002 and 2010 was never less than 64-36 and in SD 21 was never less than 61-39, even though the BVAP in both was 41%. Dkt. 90 at 7-9, 14, 16. No African-American legislator voted for the plans adopted by the legislature. Dkt. 109 at 71, 79-80.

B. The Litigation

Shortly after this Court decided *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*ALBC*"), clarifying that the use of mechanical racial targets is impermissible in districting, Appellees filed suit to challenge North Carolina's use of mechanical racial targets to create twenty-eight house and senate districts. The three-judge district court held a five-day bench trial in April 2016. On August 11, 2016, the court issued a unanimous opinion concluding that race predominated in the drawing of the twenty-eight challenged districts and that the State had failed to demonstrate that its use of race was narrowly tailored to further a compelling governmental interest. J.S. App. 2.

The district court found that the evidence unambiguously showed that race predominated above all considerations, including race-neutral districting criteria such as recognizing political subdivisions and

communities of interest, geographic compactness, and the state constitution's Whole County provision. J.S. App. 14-44, 49-113. All of these criteria were sacrificed to attain a racially proportional number of districts with at least 50%-plus-one BVAP. *Id.* Moreover, the court concluded that partisan goals were not the motivating factor in packing black voters into these districts; "[i]ndeed, the evidence suggest[ed] the opposite." J.S. App. 42. In reaching its overall conclusion, the district court conducted a careful district-by-district analysis, concluding that race predominated in drawing each of the challenged districts. J.S. App. 48-113.

The district court further concluded that the State's racial gerrymandering could not survive strict scrutiny. Assuming that a state's compliance with Sections 2 and 5 of the VRA is a compelling governmental interest, J.S. App. 114, the district court nonetheless found that the State lacked a strong basis in evidence to believe its actions were necessary. With respect to Section 2, the evidence showed that the State had not even conducted the complete *Gingles* analysis necessary to identify Section 2's applicability. J.S. App. 116-135. The evidence also showed that increasing the BVAP in the challenged districts was not necessary to provide African-American voters an equal opportunity to elect the candidates of their choice. J.S. App. 130-132.

With respect to Section 5, eleven of the twenty-eight districts were not even covered jurisdictions. J.S. App. 136. And by applying the mechanical racial targets, the legislature "failed to ask the right question," *i.e.*, whether increasing BVAP was

necessary to avoid "retrogression" in minorities' ability to elect their candidates of choice. J.S. App. 137. Indeed, in some instances the legislature's application of a 50%-or-more BVAP target increased the BVAP by more than 20%—a result clearly uncalled for by Section 5's non-retrogression principle. J.S. App. 138-139.

With liability settled, the court turned to consider remedies. Appellees requested that new maps be put in place in time for the November 2016 elections. But, balancing the equities, the court concluded there was insufficient time for the State to implement new districts prior to those elections. J.S. App. 142-144. Accordingly, it declined Appellees' request. It did, however, note that Appellees were "entitled to swift injunctive relief." J.S. App. 144. Thus, in addition to ordering that the state redraw constitutional maps and that no further elections be held pursuant to the unconstitutional maps, the court stated that it was "retain[ing] jurisdiction to enter such orders as may be necessary . . . to timely remedy the constitutional violation." J.S. App. 149. The court then requested supplemental briefs "about the appropriate deadline for the North Carolina legislature to draw new districts, the question of whether additional relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and form of that relief." Dkt. 124.

In the briefing that followed, Appellees requested that the court set a deadline of January 25, 2017 for the State to draw new districts and that special elections be held in 2017. Dkt. 132. The State countered that special elections were expensive, burdensome, and not warranted. *Id.*; Dkt. 136 at 1-2. The State argued in the

alternative that if the court considered special elections appropriate, the legislature should have until May 1, 2017 to enact new districts. *Id.* at 2. In all of the briefing and argument on these issues in the district court, the State never suggested that the court was without jurisdiction to enter further remedial orders, including an order of special elections.

On November 29, 2016, the district court issued a remedial order setting a deadline of March 15, 2017 for the legislature to draw new districts and requiring the State to conduct special elections in the fall of 2017. J.S. App. 198-204. In doing so, the district court carefully weighed the equities, concluding that the costs involved in conducting special elections "pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander." J.S. App. 199-200.

The district court denied the State's subsequent motion for a stay, Dkt. 147, but this Court granted the stay pending resolution of this appeal. *North Carolina v. Covington*, No. 16A646, 2017 WL 81538 (U.S. Jan. 10, 2017).

REASONS FOR GRANTING THE MOTION

The State's appeal of the district court's remedial order raises insubstantial issues and the order should be summarily affirmed, for a number of reasons.

First, the State's jurisdictional objection is meritless. The district court, in its initial liability order from which the State filed its first appeal with this Court, expressly retained jurisdiction to fashion a timely remedy for the constitutional violation. The issue of final remedies was plainly not encompassed by

the State's initial appeal, and the district court had jurisdiction to remedy the constitutional wrong it had found—a fact demonstrated by the parties' litigation conduct below.

Second, the court's choice of remedy—special elections in constitutionally designed districts—was well within the court's broad and flexible equitable authority to remedy constitutional violations. The scope of the State's racial gerrymander and its duration outpaces that of most such cases, as does the blatancy with which it was conducted. The remedy of special elections was clearly proportional to the violation. Moreover, the district court's remedial order was accompanied by a careful and well-reasoned balancing of the equities, and was consonant with previous cases in which special elections have been ordered.

Third, the State's federalism objections are misplaced. North Carolina has no federalism interest in placing black residents into gerrymandered districts on account of their race. The State's undoubted authority to regulate its elections is subject to the Supremacy Clause. Having violated the Equal Protection Clause, the State cannot use ancillary state law, such as term lengths and candidate residency duration requirements, to evade an equitable remedy that the district court deemed necessary to cure the constitutional harms. Nor was the district court's remedial power constrained by the North Carolina Supreme Court's ruling in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. filed*, 85 U.S.L.W. 3026 (U.S. July 5, 2016) (No. 16-24), or by the cost or administrative inconveniences of holding special elections.

Finally, Appellees respectfully request this Court's prompt disposition of this case. Given the timing of the special elections, if this case is not resolved this Term and if the previously entered stay is not lifted, the State will prevail simply by running out the clock.

I. The District Court Had Jurisdiction to Enter the Remedial Order.

The district court had jurisdiction to enter its November 29, 2016 remedial order requiring the State to hold special elections in 2017. The State's argument to the contrary rests on a misstatement of the proceedings below and a misapplication of the relevant law.

The State claims that "[t]he district court lacked jurisdiction to issue its remedial order because the State's previously filed notice of appeal divested it of power over the case." J.S. 12. Not so. "The filing of a notice of appeal . . . divests the district court of its control over *those aspects of the case involved in the appeal.*" *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (emphasis added). A notice of appeal does not divest a district court of jurisdiction over aspects of the case not involved in the appeal, and the district court retains the power to decide those issues. *See, e.g., Shevlin v. Schewe*, 809 F.2d 447, 450-51 (7th Cir. 1987) (appeal of preliminary injunction order does not divest district court of jurisdiction to proceed with the merits of a case).

In redistricting cases in particular, remedial issues *always* remain after the district court initially finds the challenged districts legally infirm and enjoins their

further use. *See, e.g.*, Order, *ALBC v. Alabama*, No. 12-cv-691 (M.D. Ala. Jan. 20, 2017) (noting that "[b]y separate order . . . , the court ha[d] declared that twelve of Alabama's legislative districts are unconstitutional and ha[d] enjoined their use in future elections," and ordering the parties to propose procedures for the "remedy phase" of the litigation).

In a case just last Term, this Court declined to accept the exact same jurisdictional argument the State makes here. In *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), the district court found Virginia's Third Congressional District was racially gerrymandered and enjoined further use of the map. While the appeal of that injunction was pending before this Court, the district court ordered a remedial plan into effect. *Id.* at 1735. Several members of Congress sought a stay, contending that the district court lacked jurisdiction to order a remedial plan because this Court already "had accepted plenary review of the liability judgment and the injunction enjoining use of the Enacted Plan." Application for a Stay at 37, *Wittman v. Personhuballah*, No. 15A-724 (U.S. Jan. 12, 2016). This Court denied the stay request, thereby affirming the district court's continuing jurisdiction to impose the remedial map. *See* 136 S. Ct. at 1735.

The district court in this case proceeded in similar fashion, finding liability and retaining continued jurisdiction over the remedy. In the district court's August 11, 2016 opinion, the court found that the State was liable for racially gerrymandering twenty-eight districts in violation of the Equal Protection Clause, but made clear that final resolution of remedial issues was forthcoming after an additional round of briefing by the

parties. The court specifically noted that it was considering "whether additional or other relief would be appropriate *before* the regularly scheduled elections in 2018, and, if so, the nature and schedule of that relief." J.S. App. 144-145 (emphasis added). The court stated that it would require briefing from the parties on these remedial issues by separate order. *Id.*

Accordingly, the district court issued two orders on August 15, 2016. In the first, the district court directed the parties to "meet and confer about the appropriate deadline for the North Carolina legislature to draw new districts, the question of whether additional relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and form of that relief." Dkt. 124. In the second order, the court denied Appellees' request to enjoin the use of the unconstitutional districts in the November 2016 elections, but granted their request insofar as the State was enjoined from using the districts for any election after November 2016. J.S. App. 148. That order expressly announced that the court's remedial work was not yet complete and that the court was "retain[ing] jurisdiction to enter such orders as may be necessary . . . to timely remedy the constitutional violation." J.S. App. 149.

The State's subsequent notice of appeal from the August 15 liability order had no effect on the district court's jurisdiction to order additional relief on November 29. The district court made clear that it had not finally resolved the issue of remedies and that it was retaining jurisdiction to do so. The question of the final remedy for the State's constitutional violation was, therefore, not resolved by the August 15 order

and not an "aspect[] of the case involved in [the State's September 13] appeal." *Griggs*, 459 U.S. at 58. Moreover, because the district court's adjudication of remedial issues did not in any way threaten to interfere with this Court's review of the questions presented in the State's first appeal, namely, whether the challenged districts were unconstitutional, the district court properly retained jurisdiction to enter further remedial orders.

The State clearly understood as much. Following the August 15 order, the State vigorously litigated the matter of remedies in the district court. In a filing submitted on September 9, 2016, the State "request[ed] that members elected in November 2016 be allowed to serve their full two year term and that no special election for legislative offices be ordered for November 2017 or any other date." Dkt. 128. The State then submitted a 17-page brief on October 28, 2016, arguing that the district court should not order special elections, but if special elections were ordered, the district court should afford the legislature more time to draw districts. Dkt. 136. Not once in any of its briefing did the State suggest that the district court had completely resolved the issue of remedies in its August 15 order or that the district court lacked jurisdiction to issue further relief on account of the State's September 13 notice of appeal to this Court. The State's litigation conduct below clearly belies its newfound jurisdictional arguments in this Court.

Moreover, in making its jurisdictional arguments, the State relies on plainly inapposite cases. These cases involve clear examples of district courts interfering with the appellate courts' jurisdiction by,

for example, reversing course on the precise issue before the appellate court, *see, e.g.*, *Donovan v. Richland Cty. Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982); *Zimmer v. McKeithen*, 467 F.2d 1381, 1382 (5th Cir. 1972), *judgment aff'd sub. nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976), or by altering a plainly final decision that was then before the appellate court, *see City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 394-95 (6th Cir. 2007); *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982).

Those cases have no relevance here. The August 15 order from which the State appealed did not finally resolve the rights of the parties in this case—a fact the court made expressly clear. The State's first appeal thus expressly did *not* encompass the final resolution of remedies, and the district court did not interfere with this Court's consideration of that first appeal by doing exactly what it told everyone it was retaining jurisdiction to do—"to enter such orders as may be necessary . . . to timely remedy the constitutional violation." J.S. App. 149.

Equally meritless is the State's reliance on the district court's statement in its August 15 order that "[t]his judgment is final." J.S. App. 149. As this Court has explained, labels do not determine jurisdiction. *See Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.7 (1990). Moreover, the State apparently misunderstands the basis for jurisdiction in this Court over a direct appeal from a three-judge court, which has nothing at all to do with whether there is a final judgment. *See* 28 U.S.C.

§ 1253. That the district court said it was entering a "final judgment" is of no relevance here.

II. The District Court Properly Exercised Its Substantial Discretion in Ordering Special Elections.

The district court acted well within its discretion in ordering the State to hold special elections in constitutionally compliant districts. As a general matter, district courts have wide authority to craft equitable remedies. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also United States v. Paradise*, 480 U.S. 149, 184 (1987) (noting it is within the district court's "sound discretion" to craft remedies for racial discrimination). Indeed, a district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Flexibility is key to the district court's equitable power. "The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992). Consistent with that principle, this Court has not "required remedial plans to be limited to the least restrictive

means of implementation"; rather, the Court has "recognized that the choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring) (internal quotation marks omitted). Moreover, this Court has emphasized that "[w]hen federal law is at issue and the public interest is involved, a federal court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (internal quotation marks omitted).

In choosing an equitable remedy for a constitutional violation, the guiding consideration for the district court is the character of the violation. "'[T]he nature of the violation determines the scope of the remedy.' A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Freeman*, 503 U.S. at 489 (quoting *Swann*, 402 U.S. at 16). Moreover, a district court's remedial orders are reviewed only for abuse of the court's broad and flexible discretion. *See Milliken v. Bradley*, 433 U.S. 267, 288 (1977).

The State does not dispute that, as a general matter, racially gerrymandered districts must be redrawn without using race as the predominant factor to include or exclude voters from particular districts. *See* J.S. 12; *Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996). Rather, the State contends that the district court's discretion was severely constrained such that it had no choice or flexibility whatsoever—that the court's only

option was to order that new maps be used in the next regularly scheduled general election in 2018. The State's position effectively eliminates the entire concept of remedial discretion for district courts.

A. The District Court Properly Weighed the Equities in Choosing to Order Special Elections.

In exercising its discretion to order special elections, the district court carefully and properly weighed the equities. The State's assertion that the court engaged in no analysis in this regard is plainly belied by the record.

In its August 11 opinion, the court first considered and rejected Appellees' request for immediate injunctive relief to prohibit the use of the challenged districts in the 2016 elections. The court explained that the election date was simply too imminent. J.S. App. 144. The court noted, however, that "[Appellees], and thousands of other North Carolina citizens, have suffered severe constitutional harms stemming from the creation of twenty-eight districts racially gerrymandered in violation of the Equal Protection Clause" and that they are "entitled to swift injunctive relief." J.S. App. 144. The court, accordingly, entertained additional rounds of briefing about the proper remedy and found that special elections were appropriate. In so ruling, the court again weighed the equities on both sides, stating:

> While special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial

> gerrymander. The Court recognizes that special elections typically do not have the same level of voter turnout as regularly scheduled elections, but it appears that a special election here could be held at the same time as many municipal elections, which should increase turnout and reduce costs.

J.S. App. 200. "[S]ensitive," however, "to the defendants' concern that the large number of districts found to be racial gerrymanders w[ould] render the redistricting process somewhat more time-consuming," the court declined to adopt Appellees' proposed timeline for any legislative redistricting process. J.S. App. 201. The court instead provided the legislature an opportunity to draw new districts by March 15, 2017—"seven months from the time the districts were held to be unconstitutional" and six weeks from the time the new legislature was scheduled to convene in January 2017. J.S. App. 201.[2]

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[2] The district court discussed the equities involved in fashioning an appropriate remedy for a third time, when it denied the State's motion to stay the court's November 29 order. *See* Dkt. 147. In doing so, it rejected the State's various arguments opposing special elections, including the State's argument that special elections were inappropriate because of the number of districts involved. The court explained that this argument "amount[ed] to little more than a claim that [the State's] racial gerrymandering is 'too big to remedy,'" and it found that "the large number of racially gerrymandered districts weighs in favor of—rather than against—awarding relief as quickly as possible." *Id.* at 4-5. The court correctly concluded that absent special elections,

These decisions, which followed extensive briefing on the matter of remedies, demonstrate the care and seriousness with which the three-judge court undertook its obligation to fashion an appropriate remedy. They also make clear that the State's suggestion that the court ordered special elections "without *any* discussion of the competing equities," J.S. i, is simply wrong. The district court sat through a full trial, issued a 167-page opinion, and analyzed supplemental briefing on the issue of remedies. Despite the State's numerous protestations that the court acted improperly because it failed to consider the equities on both sides, it is obvious that the State is simply unhappy with *how* the court evaluated and weighed the equitable considerations in this case.

Most strikingly, in criticizing the district court's balancing, the State utterly ignores the district court's recognition of the serious constitutional harms suffered by Appellees and other North Carolina voters. *See* J.S. 22-30; *see also* Dkt. 147 at 7-9 (noting the State "fail[ed] to acknowledge the considerable irreparable harm that staying the November 29 Order would impose on Plaintiffs and the public at large"). The State does not even mention the district court's conclusion that the unconstitutional districts had imposed, and are continuing to impose, "severe constitutional harms,"

"a large swath of North Carolina citizens will lack a constitutionally adequate voice in the State's legislature, even as that unconstitutionally constituted legislature continues to pass laws that materially affect those citizens' lives." *Id.* at 5.

including "substantial stigmatic and representational injuries," not just on Appellees but on "thousands of other North Carolina citizens." J.S. App. 142, 144.

The district court's assessment of the extensive harms caused by Appellants' racial gerrymandering was, however, no doubt correct. As this Court has repeatedly recognized, racially gerrymandered districts cause serious harms. Such districts "reinforce[] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Moreover, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole"—a result that is "altogether antithetical to our system of representative democracy." *Id.* at 648; *see also id.* at 658. Given these and other harms, it is virtually beyond dispute that racial gerrymandering "strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law." *ALBC*, 135 S. Ct. at 1275 (Scalia, J., dissenting); *see also id.* at 1265 (majority opinion). The district court certainly did not abuse its discretion in determining that the magnitude of these harms weighed in favor of Appellees' requested relief.

Contrary to the State's arguments, the district court likewise properly considered the duration of the violation in this case. Because of the imminence of the 2016 elections, the court permitted the unconstitutional

districts to remain in place despite this Court's admonition that once legislative districts are found unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Simms*, 377 U.S. 533, 585 (1964). If no special election were held in 2017, the harms stemming from the racially gerrymandered districts would be allowed to continue—unabated—for more than two years following a court ruling that the districts are unconstitutional, over three years after Appellees filed this suit and first sought injunctive relief, and for the better half of a decade. Under such circumstances, it was well within the district court's discretion to find that relief should not be delayed any longer.

This is particularly so given the blatancy of the racial gerrymander in this case. The predominance of race-based considerations in this case is far more egregious than the racial gerrymander this Court invalidated in *ALBC*. In that case, "[t]he legislators in charge of creating the redistricting plan believed, and told their technical advisor, that a primary redistricting goal was to *maintain* existing racial percentages in each majority-minority district, insofar as feasible." 135 S. Ct. at 1271 (emphasis added). In this case, the legislators in charge of creating the redistricting plans told their technical advisor to prioritize two race-based considerations above all else. Doing so resulted in the number of majority-black state house districts dramatically increasing from nine to twenty-three and the number of majority-black state senate districts increasing from zero to nine. J.S. App. 6-7, 28.

The harms caused by this race-based scheme were uncommonly far-reaching in scope. Yet, astonishingly, the State contends that the scope of the violation, including the need to modify the boundaries of an estimated 116 districts, counsels *against* a swift remedy in this case. J.S. 28. The fact that 116 members of the current legislature come from districts made possible by the State's unconstitutional, race-based districting scheme counsels *in favor of* a swift remedy, not against it.

Finally, the State raises two additional objections—that the three-judge court was motivated by partisan politics in ordering special elections, J.S. 28-29, and that the court concealed the potential for special elections from the voters who went to the polls in 2016, J.S. 28. Such speculation about the motivations of the three-judge court is completely inappropriate.

First, the State's suggestion that the district court's remedial order was a partisan response to the outcome of the 2016 elections is way off base. The unanimous court was composed of judges appointed by presidents of both parties. The only reason to think the decision was motivated by politics is because the State is accusing the three-judge court of being motivated by politics. The State cannot *create* that false concern and then use that false concern—"the possibility of voters drawing that conclusion," J.S. 29—as a justification to deny relief.

Second, contrary to the State's suggestion, voters went to the polls in November 2016 well aware that the court might order special elections. The court's August 11 opinion explained that it would seek additional briefing on "whether additional or other relief would be

appropriate *before the regularly scheduled elections in 2018*," J.S. App. 144-145 (emphasis added); *see also* Dkt. 124. The parties' remedial briefs—which were filed before the November 2016 election—expressly discussed the possibility of special elections in 2017. Dkt. 128, 129, 132, 133, 136. And the media covered all of this prior to the 2016 elections.[3] The State's contention that it and voters were caught unaware of the possibility of special elections blinks reality.

B. The State's Proposed Test for Ordering Special Elections is Misguided, and It Is Satisfied Here Anyway.

While (wrongly) claiming the district court neglected to balance the equities, the State also makes up out of whole cloth a "test" that it claims district courts must apply before ordering special elections. Under the State's proposal, special elections should be ordered only if: 1) the legislature acted in bad faith or committed an egregious violation, 2) the violation had a significant impact on the election results, and 3) the benefits of holding a special election outweigh the state's interest in governing once the regularly

[3] *See, e.g.*, Anne Blythe, *NC Lawyers Ask Judges to Consider Special Elections in 2017 for NC House and Senate Races*, News and Observer (Sept. 9, 2016), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article100978762.html; Lynn Bonner, *Federal Judges Find NC Legislative District Unconstitutional*, News and Observer (Aug. 11, 2016), http://www.charlotteobserver.com/news/politics-government/article95087442.html.

scheduled election is complete. J.S. 19-22. This Court has never applied the State's newly fashioned three-part "test" to determine whether special elections are appropriate.

And for good reason. Federal courts' equitable powers are broad and flexible so that they can meet the unique circumstances of a given case. Constraining courts' remedial authority in redistricting cases according to the factors in the State's made-up test risks inhibiting courts' ability to determine the most appropriate remedy for constitutional harms that undermine democratic institutions. The State's proposed factors are derived from cases whose considerations are wholly distinct from racial gerrymandering cases. Their inapplicability is obvious, not least of all because the first two proposed factors are actually in conflict with each other in redistricting cases. Under the State's proposed test, a gerrymander must be egregious *and* result in close elections. But as the egregiousness of a racial gerrymander increases, so too does the winning candidate's margin of victory. Thus, the fact that candidates in 20 of the 28 districts here ran unopposed underscores, rather than undercuts, the need for special elections in this case. States should not be able to insulate themselves from court-ordered special elections by ratcheting *up* the scope of their constitutional violation in order to ensure that elections are never close.

Moreover, the State's test makes no sense in the redistricting context because in racial gerrymandering cases the injury is the same regardless of the margin of victory. The cases upon which the State relies all involve allegations about the ability of candidates to

run or effectively campaign. *See* J.S. 20-21, 24-25. In that context, it makes sense to consider whether the violation actually affected the outcome. But in racial gerrymandering cases the violation "subject[s] [voters] to [a] racial classification," *ALBC*, 135 S. Ct. at 1265 (quotation marks omitted), and causes them to be "represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group," *id.* (internal quotation marks omitted). These injuries occur regardless of the election outcome.

Thus, although the factors proposed by the State might be relevant in other contexts, they are not relevant here. However, even if the Court adopted the State's proposed test, special elections would still be warranted in this case. First, the racial gerrymander was egregious, as discussed above. *See supra* Part II.A. Second, the gerrymander had a substantial effect on election outcomes—it was so successful that it effectively guaranteed, by non-opposition, the results of the elections in 20 of the 28 unconstitutional districts. Third, the district court properly weighed the considerations and concluded special elections were necessary. *See id.*

C. Special Elections Have Been Ordered in Similar Circumstances.

The district court's conclusion that special elections are an appropriate remedy here finds ample support in prior voting-rights cases. Contrary to the State's suggestion that special elections are virtually unprecedented, "[f]ederal courts have often ordered special elections to remedy violations of voting rights," *Ketchum v. City Council*, 630 F. Supp. 551, 565 (N.D.

Ill. 1985), and have done so in circumstances similar to those presented here.

In *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), for instance, a district court ruled that nine electoral districts in South Carolina were unconstitutional racial gerrymanders. *Id.* at 1210-11. On the matter of remedies, the court declined the plaintiffs' request that it enjoin the use of the unconstitutional districts in an upcoming election because the state's "election machinery" was already in motion. *Id.* at 1211-12. The court went on to note, however, that the "individuals in the infirm districts . . . ha[d] suffered significant harm" and were "entitled to have their rights vindicated as soon as possible so that they c[ould] vote for their representatives under a constitutional apportionment plan." *Id.* at 1212. Accordingly, the court ordered that legislators elected in districts that needed to be redrawn would serve shortened, one-year terms and special elections would be held in 1997 to select legislators to serve the remainder of the terms. *Id.* Notably, the court concluded that such relief was appropriate without "question[ing] the good faith of the legislature." *Id.* at 1208.

Smith is not an anomaly. Many other districting cases have resulted in court-ordered special elections. *See, e.g., Cousins v. City Council*, 503 F.2d 912, 914 (7th Cir. 1974) (noting that the district court, after finding racial gerrymandering, ordered special elections in modified wards); *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (ordering special elections be held in one-person, one-vote case); *Tucker v. Burford*, 603 F. Supp. 276, 279-80 (N.D. Miss. 1985) (ordering special

elections be held in one-person, one-vote case because members of the county were "represented by unconstitutionally elected officials"); *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) (three-judge court) (holding that "[b]ecause Virginia's citizens [we]re entitled to vote as soon as possible for their representatives under a constitutional apportionment plan," the court would limit elected representatives' terms and order election officials to conduct new elections the following year).

The State claims that no court has ever ordered special elections in a case where this Court found a *Shaw* violation. J.S. 11-12. Although the relevance of this assertion is unclear, it is also untrue. In *Bush v. Vera*, 517 U.S. 952 (1996), this Court affirmed a three-judge court's ruling that three Texas congressional districts were unconstitutional racial gerrymanders. On remand, the district court ordered the state to hold special elections in November and December 1996 for districts impacted by an interim plan. *See Vera v. Bush*, 933 F. Supp. 1341, 1342, 1352-53 (S.D. Tex. 1996). Specifically, it ordered that the state was required to hold special open primaries for impacted districts in conjunction with the November 1996 general presidential elections and, if necessary, hold special run-off elections in December 1996. *Id.* at 1352-53. In doing so, the court rejected the claims of some litigants that special elections would, among other things, involve administrative complications, cause voter confusion, and "effectively 'disenfranchise' the voters of the choices they made in the primary elections" held the previous March. *Id.* at 1347-52.

Special elections are an important tool in federal courts' arsenal when dealing with voting-rights violations—including racial gerrymanders. Redistricting plans are never in place for more than five cycles. Depriving federal courts of a special-election remedy could mean voters will be subjected to serious constitutional injuries for at least half a decade. Indeed, consider this case. Appellees filed suit in May 2015. Despite their request to proceed expeditiously to trial in December 2015, *see* Dkt. 20, the case went to trial in April 2016 and the court issued its liability decision in August 2016. By then, it was deemed too late to remedy the constitutional defects prior to the November 2016 elections. As the State would have it, this means Appellees must await relief until the 2018 elections and the swearing-in of new legislators in 2019.

If the word "discretion" is to have any meaning whatsoever, special elections must be a permissible remedy in cases such as this.

III. The District Court's Remedial Order Requiring Special Elections is Consonant with Federalism Principles.

Despite the State's protests to the contrary, the district court's decision to remedy the blatant constitutional violation in this case by ordering special elections is entirely consonant with federalism principles.

A. The Need to Remedy the State's Constitutional Violation Far Outweighs the Importance of Adhering to State Law Regarding Term Length and Candidate Residency Duration.

The State contends that the district court's remedial order upends principles of federalism because special elections will necessarily conflict with provisions of the North Carolina constitution establishing two-year terms for legislators and requiring legislative candidates to reside in their districts for at least a year prior to an election. *See* J.S. 29; N.C. Const. art. II §§ 6-8. The State has it backwards. Federalism does not, as the State seems to contend, mean that adherence to the federal Constitution must be delayed to accommodate ancillary provisions of state law, such as the term length and residency requirements at issue here. Rather, "as every schoolchild learns . . . under our federal system, the States possess sovereignty concurrent with that of the Federal Government, *subject only to the limitations imposed by the Supremacy Clause.*" *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (emphasis added) (internal quotation marks omitted).

Where a state law—even a facially valid state law—interferes with a federal court's remedy for a constitutional violation, the state law has no effect. *See N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees."); *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 862 (9th Cir. 1992) ("[T]he Supreme Court has stated that otherwise valid state laws or court

orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme.").

Moreover, the remedial order's modest effect on the operation of state law regarding term length and residency duration is not some unprecedented intrusion on sovereignty, as the State contends. Rather, courts routinely order equitable relief to remedy violations of federal law even where doing so requires easing state-law requirements. *See, e.g.*, Order, at 3, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Nov. 4, 2011), ECF No. 486 (shortening Texas constitution's residency requirement in connection with ordering special-election schedule); *Brown v. Ky. Legislative Research Comm'n*, 966 F. Supp. 2d 709, 726 (E.D. Ky. 2013) (explaining state constitution's residency requirement for state legislative office did not constrain deadline for drawing reapportionment plan consistent with federal constitutional standards).

The State cannot disregard the first part of the bargain of federalism—adherence to the federal Constitution's prohibition on racial gerrymandering—and then cry foul when its constitutional violation causes disruption to the operation of its state laws regarding term length and residency duration.

B. The District Court's Remedial Power is Not Limited by a State Court's Understanding of the Federal Constitution.

The State also posits that the district court's discretion to fashion relief here must be tempered by the fact that, in a different case involving different plaintiffs, the North Carolina Supreme Court, in a 4-3

split, reached a different conclusion on the merits. *See Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014); *vacated*, 135 S. Ct. 1843 (2015) (mem.); *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. filed*, 85 U.S.L.W. 3026 (U.S. July 5, 2016) (No. 16-24).

A federal court sitting in equity is, however, not obligated to follow a state court's pronouncements on matters of constitutional law. "The federal district court . . . takes as its authority on federal constitutional issues decisions of the United States Courts of Appeals and the United States Supreme Court, rather than those of the state supreme court." *In re Asbestos Litig.*, 829 F.2d 1233, 1237 (3d Cir. 1987); *see also Grantham v. Avondale Indus., Inc.*, 964 F.2d 471, 473 (5th Cir. 1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law . . . .").

Not only was the district court free to reach a different conclusion on the merits, but it certainly owed no deference—based in federalism or any other principle of law—to a state court decision with which it disagreed while fashioning its remedial order. Indeed, it would have been an abuse of discretion for the district court to soften its remedial order in deference to the *Dickson* court's contrary merits conclusion. Having found widespread constitutional violations, the district court had "not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana*, 380 U.S. at 154 (emphasis added).

C. Complying with the Remedial Order Will Not Be Time-Consuming or Disruptive to the Legislature's Agenda.

The State contends that shortened legislative terms and special elections will force legislators to focus their time on redistricting rather than other goals. J.S. 26. But the legislature will be required to draw new districts in any event, and its desire to delay that task is hardly one that should override the right of its citizens to not be placed in districts based upon their race.

Moreover, the State exaggerates the scope of the task. *See* J.S. 26 (characterizing task as "guaranteed to be time-consuming"). North Carolina law provides that two weeks is sufficient for the legislature to remedy defects in a redistricting plan. *See* N.C. Gen. Stat. § 120-2.4 (granting legislature two-week period to remedy defects in redistricting plans before courts may impose new maps). And as recently as last year, the legislature accomplished this task in two weeks' time after two of the State's thirteen congressional districts were found to be unconstitutional racial gerrymanders. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *prob. juris. noted* 136 S. Ct. 2512 (2016). In that time, the legislature adopted new redistricting criteria,[4] held seven public hearings across

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[4] *See* N.C. General Assembly, *2016 Contingent Congressional Plan Committee Adopted Criteria* (Feb. 18, 2016), http://www.ncleg.net/GIS/Download/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf.

the state,[5] and enacted new congressional maps with a new primary date.[6] The legislature also made several additional modifications to its election law to comply with the court's remedial order, including modifying filing deadlines, eligibility requirements, and permitting primary winners to be determined by a plurality vote. *See supra* note 6; *see also Stephenson v. Bartlett*, 582 S.E.2d 247, 248-49 (N.C. 2003) (describing twelve-day deadline for legislature to redraw every legislative district).

The State likewise exaggerates the level of disruption the task will pose to the legislature's other activities. As the State concedes, it has already provided the district court with its "optimal county grouping," which will speed the process of ensuring compliance with the state constitution's Whole County provision. Dkt. 136-1 at 5-8. Thus, contrary to the State's characterization, little, if any, disruption to the broader legislative agenda need occur.

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[5] *See* Rep. David Lewis & Sen. Bob Rucho, N.C. General Assembly, Memorandum to Members, Joint Select Committee on Congressional Redistricting (Feb. 12, 2016), http://www.ncleg.net/documentsites/committees/JointSelectCommitteeonCongressionalRedistricting/Joint%20Select%20Committee%20on%20Congressional%20Redistricting%20Public%20Hearing%20Notice.pdf.

[6] *See* H.B. 2, Session Law 2016-2, Extra Session (2016), http://www.ncleg.net/Sessions/2015E1/Bills/House/PDF/H2v5.pdf.

D. The District Court Was Not Required to Delay Remedying Constitutional Violations to Save the State Money.

Finally, the district court was not required to permit the unconstitutional legislative districts to remain in place until the 2018 election on account of the cost to the State of conducting special elections. "[T]he prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 691 (1977). Here, the district court acted within its broad power to remedy the State's far-reaching constitutional violation by ordering special elections in new districts. In doing so, the district court considered the costs involved, but it concluded that the need to quickly remedy the constitutional violations outweighed those costs. *See* J.S. App. 200. This was well within the court's discretion.

IV. The Court Should Ensure this Case is Finally Resolved this Term.

This Court should summarily affirm the district court's remedial order. As explained more fully in the pending motion to affirm the district court's liability decision, this case is even more straightforward than *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *prob. juris. noted*, 136 S. Ct. 2512 (2016), and *Bethune-Hill v. Virginia State Board of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), *prob. juris. noted*, 136 S. Ct. 2406 (2016). At issue here was a blatantly unconstitutional racial gerrymander that subordinated traditional redistricting principles to implement explicit racial quotas. The district court's considered effort to

craft an appropriate remedy was not an abuse of discretion.

However, if this Court opts not to summarily affirm, Appellees respectfully request that this Court consolidate this matter with the liability case and expedite merits briefing for argument in April.[7] If the Court issues a decision by June, special elections still could take place in November 2017. If, however, this Court does not decide this case during this Term and does not lift the stay, the State would win by default because the November 2017 special elections ordered by the district court would not be possible.

An even more unfortunate outcome could result if this Court chooses instead to hold this case, and then vacate and remand both this case and the underlying merits appeal for reconsideration in light of the forthcoming decisions in *Harris* and/or *Bethune-Hill*. Such an order would cause intolerable delay. Whichever party did not prevail upon reconsideration in the district court would no doubt return to this Court yet again. Not only would such a delay render special elections impossible in 2017, it would also raise a serious possibility that no remedy would be ordered in time for the regularly scheduled 2018 elections. Thus, an order vacating and remanding for reconsideration in

---

[7] An order expediting briefing and argument in this case would not be unprecedented. In *Perry v. Perez*, 132 S. Ct. 843, 843 (2011) (mem.), involving Texas's redistricting plan, the parties completed briefing and argued the case within one month of this Court's order noting probable jurisdiction. *Id.*

light of *Harris* and/or *Bethune-Hill* might very well permit yet another election to proceed using unconstitutional, racially gerrymandered districts.

* * * *

North Carolina's egregious racial gerrymander has continued unabated for far too long. The district court's decision to impose a swift remedy by requiring special elections in 2017 was plainly within its broad equitable discretion. The State's continued effort to delay remedying its racially discriminatory legislative districts must be rejected, and the remedial order affirmed in time to be effective for special elections this fall.

CONCLUSION

The motion to affirm should be granted.

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No. 16-1023

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, ET AL.,
Appellants,

v.

SANDRA LITTLE COVINGTON, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OPPOSING MOTION TO AFFIRM

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BRIEF OPPOSING MOTION TO AFFIRM

Plaintiffs still have not identified anything that makes this the extraordinary case in which a *Shaw* violation cannot be remedied simply by ordering new maps before the next regularly scheduled election. Instead, they just emphasize the discretion courts enjoy in fashioning equitable remedies, while conspicuously refusing to acknowledge any limits on that discretion or even any framework to guide its exercise. At bottom, plaintiffs' position is that special elections are *always* appropriate remedies for *Shaw* violations, notwithstanding the harms they inflict on state sovereignty. Indeed, plaintiffs even go so far as to claim the district court was *required* to order a special election, notwithstanding that the remedy in every one of this Court's *Shaw* cases has been limited to ordering new plans for the next regularly scheduled election.

Plaintiffs take the same anything-goes approach regarding the district court's lack of jurisdiction to issue the remedy, insisting that a court is free to ignore the rule divesting it of jurisdiction as long as it announces its intention to keep its options open in advance. But plaintiffs do not cite a single case suggesting that courts can expand their jurisdiction by their own say-so. To the contrary, even their own authorities uniformly hold that once a notice of appeal is filed, district courts retain the power to *implement* unstayed injunctions, but lose the power to interfere with the appellate function by ordering *new* remedies. The district court here unquestionably did the latter, and the fact that this appeal now encompasses two fully briefed

jurisdictional statements sandwiched around an emergency stay application proves the wisdom of the rule the district court ignored. Finally, as the first of those jurisdictional statements explained, there is no underlying constitutional problem for the court to remedy in the first place.

At bottom, the district court lacked jurisdiction to order special elections, made no meaningful effort to justify them, and erred at the outset in finding a constitutional violation. Accordingly, the special-election order cannot stand.

I. The District Court Lacked Jurisdiction To Issue The Special-Election Order.

Plaintiffs do not dispute the general rule that "only one court at a time has authority in a case." *Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 638 (7th Cir. 2006). Yet they claim that the district court exempted itself from that rule by stating in its final judgment that it "retain[ed] jurisdiction to enter such orders as may be necessary to enforce this Judgment and to timely remedy the constitutional violation." Mot.13-14; JS.App.149. But while the court might have *wanted* to exempt itself from the general rule, plaintiffs do not cite any case holding that a district court's wish is an appellate court's command when it comes to retaining jurisdiction post-appeal. Plaintiffs' failure is unsurprising, as the jurisdictional rule would be pointless if lower courts could opt out at will.

Plaintiffs fare no better in arguing that the district court retained jurisdiction because the "final remedy" remained unresolved. Mot.13-14. The same could be said of *every* case in which a court attempts

to alter the scope of relief post-appeal—any remedy ordered post-appeal is *by definition* not part of the appeal and renders the earlier relief non-final in the district court's eyes. But that just confirms that plaintiffs' preferred rule is not the law and would have untenable consequences. Indeed, were it not for this Court's stay, the special election could have largely mooted the State's appeal, while a ruling for the State on appeal could have mooted the special-election order. There are sensible reasons underlying the settled one-court-at-a-time rule of jurisdiction.

That rule is not, as plaintiffs suggest, limited to post-appeal orders that directly conflict with the issues on appeal. Mot.15. District courts lose jurisdiction over all matters within the scope of the appeal the moment the notice of appeal is filed, regardless of which issues the appellant pursues. Thus, in *City of Cookeville v. Upper Cumberland Electric Membership Corp.*, 484 F.3d 380, 384 (6th Cir. 2007), the district court lacked jurisdiction to enjoin a construction project, even though the pending appeal concerned only damages. Likewise, in *McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982), the district court lacked jurisdiction to reinstate employees, even though the pending appeal concerned only liability. Here, the district court's initial final judgment imposed a remedy (a remedy that will be unnecessary should the State prevail on appeal), so the State's notice of appeal divested the court of jurisdiction to order a new one.

Neither of the cases plaintiffs cite supports their novel jurisdictional theory, as each involved

implementation of an injunction, not *expansion* of one. Mot.11-12. The order from *Alabama Legislative Black Caucus v. Alabama* (*ALBC*) does not contemplate special elections or any other relief beyond that initially ordered; it merely directs the parties to propose procedures "[f]or purposes of implementing the court's intended remedy." Order at 3, *ALBC*, No. 12-cv-691 (M.D. Ala. Jan. 20, 2017), Dkt.318.

The order in *Wittman v. Personhuballah* likewise focused on implementation. The district court's initial order prohibited Virginia from using its invalidated districting plan in future elections and required it to adopt a new plan by September 1, 2015. *Wittman*, 136 S. Ct. 1732, 1735 (2016). After the legislature failed to comply with that deadline (and while the case was on appeal to this Court), the district court appointed a special master to develop a remedial plan. *Id.* That order fell squarely within the rule allowing a district court to "take action to enforce its order," *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987), as it merely implemented the initial remedy by ensuring that no future elections would use the invalidated plan.

Finally, to the extent plaintiffs argue that the State waived its jurisdictional argument, Mot.14, they are factually and legally incorrect. The State urged the district court not to impose a special election because, among other things, doing so would interfere with this Court's appellate review. D.Ct.Dkt.136 at 8-11. And even if the State had not, this jurisdictional defect is not waivable: "Every federal appellate court has a special obligation to

'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). Because the district court lacked jurisdiction to issue its sweeping remedial order, the order cannot stand.

II. The Extraordinary Remedy Of A Special Election Is Improper.

Jurisdiction aside, plaintiffs once again identify nothing about this case that warrants departing from the presumptive remedy for a *Shaw* violation and imposing the "drastic if not staggering" remedy of a special election. *Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 478 (7th Cir. 1986). Nor do they meaningfully rebut the many reasons why that remedy is particularly *un*warranted here, including that the legislature acted in good faith, the districts were upheld (twice) by the State's highest court, the alleged violation did not disfranchise voters, and the special election would work massive harms on the State and its citizens. JS22-31. Instead, plaintiffs just blithely assert that the state court proceedings upholding the same districts against the same constitutional attack were entitled to "no deference" at all, Mot.32, and resist the premise that special elections are extraordinary, Mot.16-18. Indeed, not only do they insist (contrary to reality) that special elections are routine and appropriate; they even make the remarkable claim that it would have been an "abuse of discretion" *not* to order a special election. Mot.32.

That startling position cannot be reconciled with decades of *Shaw* jurisprudence. As courts have repeatedly recognized, a special-election remedy should be reserved for "the most extraordinary of circumstances." *Gjersten*, 791 F.2d at 478. Plaintiffs disagree, warning that limiting special-election remedies to extraordinary cases could force voters to "be subjected to serious constitutional injuries for at least half a decade." Mot.29. But the only reason this case is still ongoing in 2017 is that state litigation went forward first and plaintiffs waited more than *four years* to bring a federal suit. Once they actually initiated litigation, the case proceeded from complaint to trial in less than one year. Mot.29. Accordingly, when plaintiffs timely file and expeditiously litigate meritorious *Shaw* claims, there is little reason to worry about unconstitutional districts lingering for multiple election cycles.

Plaintiffs claim that several courts have ordered special elections "in circumstances similar to those presented here." Mot.26-27. But besides *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), which the State noted and distinguished in its jurisdictional statement, JS18 n.4, none of their cases (all of which are over 30 years old) is remotely "similar" to this one. They all pre-date *Shaw*, most involve malapportionment, and the violation in each was purposeful or indisputable. Here, by contrast, the legislature acted in good faith and the districts were twice upheld against state and federal constitutional attack. JS23-24.

As for *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996), the remedial order there bears no resemblance

to the sweeping order in this case either. There, after this Court invalidated the State's congressional districts, the district court ordered that the next round of elections be held under a court-imposed districting plan. *Id.* at 1342. Although the court curiously used the term "special election," it did not change the election date, unseat elected legislators, or alter residency requirements enshrined in the state constitution. Moreover, even though there was "virtually no disagreement among the parties or *amici* that ... new districts c[ould] be employed in the [next] elections," *id.* at 1347, the court supported its order with a comprehensive opinion that carefully considered all the equities, *id.* at 1347-52. In both function and form, the remedial order in *Vera* stands in sharp contrast to the lightly reasoned special-election order in this case.

Indeed, while plaintiffs spend several pages purporting to defend the district court's "equitable balancing," the vast majority of the language they quote is from the court's *initial* memorandum opinion—in which it correctly concluded that the 2016 elections should proceed as scheduled. Mot.18, 20-21. The court's subsequent special-election order, by contrast, devotes a total of two sentences to discussing whether a special election is an appropriate remedy. Mot.18-19. That meager analysis is no substitute for the careful "equitable weighing process" this Court's precedents require. *NAACP v. Hampton Cty. Election Comm'n*, 470 U.S. 166, 183 n.36 (1985).

Unable to reconcile the district court's cavalier approach with the factors other courts have considered, plaintiffs accuse the State of

manufacturing those factors out of whole cloth. Mot.24-25. But there is no denying that the few courts to order special elections have done so only to cure egregious violations that affect election outcomes, and even then only if a special election's benefits outweigh its considerable costs. JS19-22. Plaintiffs protest that (as the jurisdictional statement acknowledges, JS19) *this* Court has yet to embrace those factors, but that is only because special elections are so rare that the Court has no occasion to weigh in on when they might be warranted.

Plaintiffs contend that those factors "conflict with each other." Mot.25. Not so. While one can hypothesize a hapless but fully intentional violator, voters are packed or cracked not for sport, but to impact election results. Thus, most egregious or bad-faith violations will affect election results; indeed, some of plaintiffs' own authorities fit that description perfectly. *See, e.g., Cousins v. City Council of Chicago*, 503 F.2d 912, 914 (7th Cir. 1974) ("purposeful" racial discrimination changed "a black majority ... into an overwhelmingly white majority"); *Keller v. Gilliam*, 454 F.2d 55, 55-56 (5th Cir. 1972) (extreme malapportionment allowed 27% of the population to "control the entire county government"); *see also Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

Moreover, even if those factors were in any tension, plaintiffs fail to show that *either* is satisfied here. First, their argument that the alleged violation was "egregious" is premised on a mistaken interpretation of *ALBC*, as this Court just reiterated that *ALBC* does not "condemn the use of BVAP targets ... in every instance." *Bethune-Hill v. Virginia*

State Bd. of Elections, No. 15-680, Slip op.16 (U.S. Mar. 1, 2017). Furthermore, plaintiffs do not even address the district court's narrow-tailoring analysis, which is where that court went furthest astray by concluding that the State lacked "good reasons" to draw *any* majority-minority—or even cross-over or coalition—districts *anywhere* in the State. JS.App.179-96. As for election results, plaintiffs assert that candidates in challenged districts were unopposed only because of the purported gerrymander, Mot.26, but they have never even attempted to prove that assertion. And even if they were right, they still do not claim that any of the challenged districts (which they agree should be drawn as ability-to-elect districts) would actually elect the Republican candidate under a remedial map.

Perhaps recognizing that reality, plaintiffs emphasize that the harms caused by racial gerrymandering extend beyond election results. Mot.26. That may well be true, but the remedy that cures the expressive harms to which plaintiffs refer is the remedy the district court initially ordered—*i.e.*, a judicial declaration of unconstitutionality and the enactment of new districts based on traditional districting principles. Plaintiffs never explain why that remedy does not suffice here, or what benefits a special election would bring that would justify the extraordinary incursion on state sovereignty it entails.

Instead, plaintiffs just disparage the harms the special-election order inflicts on North Carolina's sovereignty. Mot.30-35. But contrary to plaintiffs' imagined arguments, the State never claimed that "adherence to the federal Constitution must be

delayed to accommodate ancillary provisions of state law," or expressed any confusion about how the Supremacy Clause works. Mot.30-32. If there really is a racial gerrymander here, the State will remedy it. But the Constitution does not guarantee a right to a special election, and it certainly does not do so when a less intrusive remedy cures the violation just as well.

That is why this Court has repeatedly instructed courts choosing among possible remedies for districting violations to avoid intruding "upon state policy any more than necessary." *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971); *see also Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("[C]ourts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."). Where, as here, the presumptive remedy for a *Shaw* violation would be equally effective as a federalism-obliterating special election that unseats legislators from unchallenged districts and abrogates multiple provisions of the state constitution, choosing the latter option "is not required by the Federal Constitution and is not justified as an exercise of federal judicial power." *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 200 (1972).

III. There Was No Constitutional Violation To Remedy, Especially In Light Of This Court's Decision In *Bethune-Hill*.

This Court also should vacate the special-election order because there was no constitutional violation to remedy in the first place. JS31-34. That is even clearer after this Court's recent opinion in *Bethune-Hill*, which provides additional guidance on how courts should apply strict scrutiny in racial

gerrymandering cases. At least two aspects of that opinion cast even further doubt on the decision below.

First, as noted, *Bethune-Hill* clarified that this Court's decision in *ALBC* does not "condemn the use of BVAP targets ... in every instance." Slip op.16. While Alabama's use of BVAP targets as high as 70% was impermissible, *Bethune-Hill* explained that Virginia's 55% BVAP target was appropriate to ensure that minority voters had "a functional working majority." *Id.* The district court in this case, by contrast, read *ALBC* as holding that a State's districting plan *never* is narrowly tailored if it relies on a "mechanically numerical" BVAP target, JS.App.138, and it repeatedly faulted the State for using a "50%-plus-one target" in drawing district lines, JS.App.140.

Second, *Bethune-Hill* marks the first time this Court has held that a State's use of race in drawing district lines satisfied strict scrutiny. While this Court had set out the "strong basis in evidence" standard in past cases, *Bethune-Hill* provides the first concrete example of a "functional analysis" that satisfies the standard. Here, the North Carolina legislature conducted an analysis of voting conditions that is at least as robust as the analysis conducted by the Virginia legislature, yet the court below concluded that it nonetheless lacked a "strong basis in evidence" to draw majority-minority—or even cross-over or coalition—districts *anywhere in the state.* JS.App.183-93. That conclusion simply cannot be squared with the strict scrutiny analysis in *Bethune-Hill*, providing yet another reason to summarily reverse the merits decision below. At an absolute minimum, this Court should hold the jurisdictional statements pending this

Court's upcoming decision in *Cooper v. Harris*, No. 15-1262, and then note probable jurisdiction, vacate, and remand both the merits decision and the remedial decision for further consideration in light of *Harris* and *Bethune-Hill*.[1]

---

[1] Plaintiffs implore the Court to note probable jurisdiction instead of holding and/or remanding, and to order merits briefing and argument on an extraordinarily expedited schedule to avoid "intolerable delay." Mot.36. But their suggestion that the State is trying to "run[] out the clock," Mot.3, is wholly unjustified. In fact, the State, mindful of the time constraints, volunteered almost three months ago in its stay application to brief and argue this case on an expedited schedule. The State also expedited completion of briefing on its merits-stage jurisdictional statement to ensure that the Court could note probable jurisdiction in time to hear argument this Term should it be so inclined. The Court having twice declined the opportunity to order merits briefing and argument this Term, it would make little sense to now order the parties to brief and argue the case in a matter of weeks.

CONCLUSION

The district court's merits decision should be summarily reversed and its special-election order should be vacated. In the alternative, the Court should note probable jurisdiction, vacate, and remand for further consideration in light of *Harris* and *Bethune-Hill*.

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NOS. 16-649, 16-1023

In the
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STATE OF NORTH CAROLINA, et al.,

Appellants,

v.

SANDRA LITTLE COVINGTON, et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

APPELLANTS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The two appeals under this caption present three distinct questions, none of which is answered by this Court's recent decision in *Cooper v. Harris*, No. 15-1262 (May 22, 2017). The first appeal, No. 16-649, asks whether the district court committed legal error by refusing to give preclusive effect to an on-point decision by the North Carolina Supreme Court and, if not, whether the district court erred by holding that the North Carolina legislature lacked a strong basis in evidence to design *any* of its state legislative districts as ability-to-elect districts of any kind. The decision in *Cooper* does not address or resolve either of those questions—its preclusion holding was based on a factual quirk not present here, and its strict-scrutiny holding answered a question the court below did not reach. Accordingly, nothing in *Cooper* diminishes the case for plenary review of the first appeal.

The second appeal, No. 16-1023, asks whether the district court erred when it invalidated past election results and ordered off-year special elections throughout the State. Nothing in *Cooper* addresses the appropriate remedy for a racial gerrymandering violation or sheds any light on whether the district court's extraordinary remedial order was warranted. The district court in *Cooper* found violations but did not order special elections as a remedy. Thus, the remedial question in the second appeal did not arise. Accordingly, if this Court does not summarily reverse or note probable jurisdiction in the first appeal, it should exercise one of those options in the second appeal. Any other disposition would endorse the

district court's and plaintiffs' untenable and unprecedented view that special elections are *always* appropriate remedies for *Shaw* violations, notwithstanding the significant harms they inflict on state sovereignty and the significant strain they place on state resources.

I. The Decision In *Cooper* Does Not Resolve The Merits Questions In This Case.

In *Cooper*, this Court affirmed the district court's decision invalidating two North Carolina congressional districts. Two aspects of the *Cooper* decision merit discussion here. First, this Court held that the North Carolina Supreme Court's decision in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), did not preclude the *Cooper* lawsuit as a matter of claim or issue preclusion. *Cooper*, slip op. 7-9. That holding was based on the Court's view that there was a factual flaw in the State's privity submission: "North Carolina never satisfied the District Court that the alleged affiliation [between the organizational plaintiffs in *Dickson* and the individual plaintiffs in *Cooper*] really existed." *Id.* at 8. That factual flaw obviated any need to answer the question at the core of the State's preclusion argument—*i.e.*, whether a fully litigated lawsuit by an organization precludes a functionally identical lawsuit by members of that organization. This Court expressly reserved that legal question. *See id.* at 9 ("We need not decide whether the alleged memberships would have supported preclusion if they had been proved.").

That legal question is squarely presented here. Plaintiffs conceded—both in their depositions and in their motion to affirm—that some of them "are

members of organizations that were plaintiffs in *Dickson*." MTD1.38; JS1.14-15 & n.2.[1] Accordingly, the factual predicate to preclusion that was lacking in *Cooper* is present here, and this case cannot be resolved without deciding the question that *Cooper* left unresolved. That alone merits plenary review. This Court should note probable jurisdiction and decide whether organizations may take a second (and third and fourth) bite at the apple by sending their members to fight redistricting battles the organizations already fought and lost.[2]

Second, this Court held that North Carolina's Congressional District 1 did not satisfy strict scrutiny because the State's belief "that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district" was not grounded in a strong basis in evidence. *Cooper*, slip op. 17. Critically, the Court *did not* hold that the State lacked a strong basis in evidence to consider race *at all* in drawing District 1. Rather, it took issue only with the legislature's decision to "augment," "boost," or "ramp up" the district's BVAP. *Id.* at 14-17 & n.5. In other words, even if the legislature had good reasons to fear a Section 2 violation if it ignored race altogether, this Court held that the State erred in believing that it needed to draw

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[1] "JS1" and "MTD1" refer to the jurisdictional statement and motion to dismiss in No. 16-649; "JS2" and "MTD2" refer to the jurisdictional statement and motion to dismiss in No. 16-1023.

[2] This case also includes a second basis for privity: The *Dickson* lawsuit was organized and funded by The Democracy Project II, which also organized and funded this lawsuit. JS1.15-16; JS1.Reply.3-4.

District 1 as a majority-minority district to remedy that potential violation.

That holding has no bearing on this appeal. The district court in this case never decided whether the legislature had good reasons to increase the BVAP of the challenged state legislative districts. Instead, the district court rested its decision on the antecedent holding that the legislature lacked "a strong basis in evidence for *any* potential Section 2 violation *at all*." JS1.30. That is, the district court prohibited the legislature not only from converting supposed crossover or coalition districts into majority-minority districts (as in *Cooper*), but also from intentionally creating or maintaining any ability-to-elect districts whatsoever—*i.e.*, from considering race *at all* in drawing district lines. The district court reached that extraordinary holding even though the legislature received uncontradicted evidence confirming the existence of racially polarized voting throughout the State, JS1.24-29, and even though plaintiffs conceded that the State likely would face Section 2 liability if it did not consider race in drawing district lines, JS1.30-34.

That holding goes far beyond anything this Court suggested in *Cooper*, and it could have dire consequences for minorities in North Carolina. The General Assembly currently has more African-American members than at any other point in the State's history, and that success is in no small part owing to the State's diligent efforts to create and maintain majority-minority districts as part of its good-faith efforts to comply with the Voting Rights Act as interpreted by this Court. If the State cannot

continue to take race into account when drawing lines even in districts that have been considered *Gingles* districts for decades, then there is a very real prospect that this progress will not continue.

Yet that is precisely the result that affirming the decision below threatens to bring about. If this Court does not correct the district court's error, North Carolina will be inescapably "trapped between the competing hazards of liability" under the Voting Rights Act and the Constitution. *Bush v. Vera*, 517 U.S. 952, 977 (1996). The district court's constitutional holding would forbid the State from considering race in drawing district lines, while the Voting Rights Act would require it to do exactly that to prevent vote dilution in already-existing ability-to-elect districts. JS1.33-34. If that is the real consequence of this Court's jurisprudence, then there seems to be just one way out—*i.e.*, for the State on remand to blind itself to race altogether and then defend against the inevitable Section 2 claim by challenging the constitutionality of the VRA. After all, if what Section 2 affirmatively commands is forbidden by the Fourteenth Amendment, then this Court must either construe the VRA as inapplicable to redistricting, *cf. Cooper v. Harris*, No. 15-1262 (Thomas, J., concurring), or invalidate it as unconstitutional.

To avoid those undesirable consequences, this Court should summarily reverse the district court insofar as it held that North Carolina lacked good reasons to consider race at all, and then remand for consideration of whether the State had good reasons

to increase the BVAPs of the challenged districts.[3] In the alternative, the Court should note probable jurisdiction and clarify the extent to which States may or must consider race while redistricting.

II. Regardless Of How This Court Resolves The Merits Appeal, The District Court's Remedial Order Cannot Stand.

Regardless of how this Court resolves the merits appeal, it should summarily reverse or note probable jurisdiction over the district court's doubly flawed remedial order. The district court lacked jurisdiction to issue that order because the State's previously filed notice of appeal divested the court of power to expand upon its previously ordered remedy. JS2.12-16. And the district court lacked justification for the remedial order because this simply is not the extraordinary case that might justify the federalism-obliterating remedy of invalidating election results and ordering off-year special elections throughout the State. JS2.16-31. Indeed, all the reasons why a special election is unwarranted have only intensified since this Court granted an emergency stay of the remedial order, as forcing the State to hold special elections on what would now be an extraordinarily expedited schedule would impose massive costs on

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[3] The state legislative districts at issue in this case do not share the electoral history of Congressional District 1, which this Court described in *Cooper* as "an extraordinarily safe district for African-American preferred candidates" even with a BVAP below 50%. Slip op. 13. For example, from 2004 to 2008, African-American candidates ran for a House seat 23 times in majority-white districts and won only three times, and not a single African-American candidate was elected from a majority-white district in 2010. JS1.28.

the state fisc and inflict untold harms to state sovereignty.[4]

More to the point, nothing in the *Cooper* decision addresses the appropriate remedies for racial gerrymandering violations, and so nothing in that decision answers the questions presented in the second appeal. And those questions are weighty indeed: Plaintiffs' position is that special elections are *always* appropriate remedies for *Shaw* violations, notwithstanding the significant harms they inflict on state sovereignty and the significant strain they place on state resources. Plaintiffs even go so far as to claim the district court was *required* to order a special election, even though the remedy in every one of this Court's *Shaw* cases has been limited to ordering new plans for the next regularly scheduled election. *See* JS2.Reply.5-7. Unless special elections are to become *de rigueur* in remedying *Shaw* violations, this Court should summarily reverse or note probable jurisdiction over the remedial order.

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[4] The State previously volunteered to brief and argue this case on an expedited schedule, *see* Emergency Application For Stay Of Remedial Order, *North Carolina v. Covington*, No. 16A646 (Dec. 30, 2016), and it expedited completion of briefing on its merits-stage jurisdictional statement to ensure that the Court could hear argument this Term should it be so inclined. While the State remains willing to brief any aspect of this case on an expedited basis, the reality is that planning and executing a special election at this point would be exceedingly difficult (if not entirely unrealistic). If this Court notes probable jurisdiction and orders this case briefed and argued in the normal course, neither the merits nor remedial issues would be moot before this Court could decide the appeal, and the Court's opinion could provide substantial guidance on recurring issues.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction over the appeals in this case.

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STATE OF NORTH CAROLINA, *ET AL.*,
Appellants,

v.

SANDRA LITTLE COVINGTON, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

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RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

This Court's decision in *Cooper v. Harris*, No. 15-1262, 2017 WL 2216930 (U.S. May 22, 2017), and its subsequent vacatur of the North Carolina Supreme Court's decision in *Dickson v. Rucho*, No. 16-24, 2017 WL 2322831 (May 30, 2017), squarely answer the merits questions presented in *Covington v. North Carolina*, No. 16-649, and therefore the three-judge court's unanimous decision in that case should be summarily affirmed. The only issue left for this Court is the proper remedy for the rampant constitutional violations in North Carolina's state legislative districting plans. As explained in Appellees' motion to affirm in *Covington v. North Carolina*, No. 16-1023, the court below had jurisdiction and acted well within its equitable discretion in ordering that the proper remedy was a special election under a newly drawn remedial map in November 2017.

Appellants—who asked for and received a stay of any remedial proceedings while these appeals were pending—now argue that because of their stay request, it would be "exceedingly difficult (if not entirely unrealistic)" to plan and execute a special election by November 2017. Supp. Br. 7 n.4. Setting aside that this is a problem entirely of their own making, whether or not elections can now take place in November 2017 is a matter for the court below to decide in the first instance. Thus, if this Court does not summarily affirm the remedial order, it should remand for an expeditious determination of whether elections in November 2017 are still possible, and, if not, how to ensure that the voters of North Carolina do not have to live and vote in

unconstitutional districts for any longer than is absolutely necessary.

I. This Court's Decision In *Cooper* And The Subsequent Vacatur In *Dickson* Squarely Answer The Merits Questions Here.

Contrary to Appellants' argument, *Cooper* squarely resolves the merits questions in this case. The *Cooper* decision's fundamental holding regarding Congressional District 1 ("CD1")—a district the Appellants defended as compelled by the State's interest in complying with Section 2 of the Voting Rights Act—is directly relevant to the trial court's ruling in *Covington* and is controlling here. Moreover, both the decision in *Cooper* and the Court's subsequent vacatur of the North Carolina Supreme Court's decision in *Dickson* resolve any remaining questions of preclusion.

In *Cooper*, this Court explained that for the State "[t]o have a strong basis in evidence to conclude that §2 demands ... race-based steps [to deliberately augment a district's black voting age population], the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures." *Cooper*, 2017 WL 2216930, at *13. This Court saw "nothing in the legislative record that fits that description." *Id.* The court below in this case similarly unanimously found, after an exhaustive review of the evidence demonstrating that race predominated in the drawing of the twenty-eight districts at issue, that Appellants "failed to demonstrate that, for any challenged district, they had a strong basis in evidence for the third *Gingles* factor –

racial bloc voting that, absent some remedy, would enable the majority usually to defeat the minority group's candidate of choice.... This failure is fatal to their Section 2 defense." No. 16-1023 App. 117. In short, for CD1 and for each of the twenty-eight legislative districts challenged in this case, the exact same Appellants offered the exact same defense. And this Court found that Appellants' defense "rested not on a 'strong basis in evidence,' but instead on a pure error of law." *Cooper*, 2017 WL 2216930, at *14.

Appellants' extraordinary argument that the holding in *Cooper* "has no bearing on this appeal" because here the district court "prohibited" the legislature from maintaining any ability-to-elect legislative districts in North Carolina, Supp. Br. at 4, rests on a complete mischaracterization of both the facts and the opinion of the court below. The court below explicitly stated that "[o]ur decision today should in no way be read to imply that majority-black districts are no longer needed in the state of North Carolina. Nor do we suggest that majority-black districts could not be drawn – lawfully and constitutionally – in some of the same locations as the districts challenged in this case." No. 16-1023 App. 145. Appellants completely ignore this, as well as the entire basis of the trial court's opinion, choosing instead to continue quoting a single phrase from the opinion out of context.

Appellants' remaining argument about preclusion is answered both by *Cooper* and by the Court's vacatur of the North Carolina Supreme Court's opinion in *Dickson*. It is axiomatic that this Court's order vacating and remanding, for a second time, the *Dickson* decision, does not amount to a final determination on

the merits, *see, e.g., Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), and therefore cannot have preclusive effect. Indeed, in another context, it has been noted that "a vacated judgment, by definition, cannot have any preclusive effect in subsequent litigation." *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, Inc.*, 468 U.S. 1206 (1984) (Blackmun, J., dissenting). Yet Appellants seek to bar the suit below on the basis of a now-vacated ruling in a different case, involving different districts, which will almost certainly need to be overturned upon reconsideration by the North Carolina Supreme Court in light of this Court's decision in *Cooper*. That attempt should be rejected.

In any event, Appellants fail to mention the actual findings of the court below on preclusion. Just as in *Cooper*, the court below found a factual flaw in Appellants' attempt to assert a *res judicata* defense based on the earlier state court proceedings in *Dickson*. After hearing evidence at trial concerning the alleged privity between plaintiffs in the two cases, and after at least two rounds of briefing on the legal question, (which is clearly governed by state law, *see Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Johnson v. DeGrandy*, 512 U.S. 997, 1005 (1994)), the court below held: "Recognizing none of the Plaintiffs in this action was either a plaintiff in the *Dickson* litigation or in privity with one, Defendants argue that the exception to privity recognized in *Thompson v. Lassiter*, 97 S.E.2d 492 (N.C. 1957), applies. However, Defendants have not produced sufficient evidence to prove the elements of the *Lassiter* exception." No. 16-1023 App. 13-14, n.9 (citation omitted). Thus, this Court need not decide

whether the facts necessary to establish a *Lassiter* exception under North Carolina law would have supported preclusion if they had been proved. Just as in *Cooper*, "[i]t is enough that the District Court reasonably thought they had not." *Cooper*, 2017 WL 2216930, at *10.

Finally on the merits, Appellants' suggestion that the opinion of the court below will have "dire consequences" for minority representation, Supp. Br. at 4, and that they—unlike the court below—have the best interests of minority groups at heart is risible. Every African-American legislator in the legislature in 2011 voted against these districts and groups such as the NAACP and the A. Philip Randolph Institute in the *Dickson* litigation, and the individual African-American plaintiffs in this case, then mounted challenges to these districts. If the State were truly concerned about minority representation, it would have undertaken an actual Section 2 analysis when it engaged in redistricting—including evaluating *all* of the *Gingles* prongs—rather than using the pretext of the Voting Rights Act to racially gerrymander. Appellants' newfound concern for minority representation rings remarkably hollow.

Cooper squarely controls the merits questions here and summary affirmance of the court below in appeal No. 16-649 is warranted.

II. Appellees Are Entitled To A Swift Remedy.

As to the remedy for Appellants' constitutional violations, at Appellants' request, this Court stayed the three-judge court's remedial order requiring special elections in November 2017 pending resolution of these

appeals. *See North Carolina v. Covington*, No. 16A646, 2017 WL 81538 (U.S. Jan. 10, 2017). Appellants now claim that because of the very delay they requested with their stay application, "forcing the State to hold special elections on what would now be an extraordinarily expedited schedule would impose massive costs on the state fisc," and would be "exceedingly difficult (if not entirely unrealistic)." Supp. Br. 6-7 & n.4.

This Court should not rely on the unsupported assertions of Appellants' counsel. Whether or not a special election in November 2017 is still possible is a matter for the court below to address in the first instance. North Carolina law expressly provides that two weeks is sufficient for the legislature to remedy defects in a redistricting plan. *See* N.C. Gen. Stat. § 120-2.4 (granting legislature two week period to remedy defects in redistricting plans before courts may impose new maps). The court below is in a much better position than this Court to evaluate the relevant timelines. Thus, if this Court does not summarily affirm the remedial order, it should remand with instructions that the court below should quickly determine the feasibility of holding special elections in November 2017, and, if that is no longer possible, to implement a remedy such that the voters of North Carolina do not have to live and vote in unconstitutional districts any longer than is absolutely necessary.

Appellants' contention that "neither the merits nor the remedial issues would be moot" if this Court were to note probable jurisdiction and order this case briefed and argued in the normal course is disingenuous at best. Supp. Br. 7 n.4. In reality, this appears to be yet

another tactical ploy for still further delay such that Appellants might even be excused from implementing a remedy in time for the regularly scheduled 2018 elections. As Appellants are well aware, if this Court notes probable jurisdiction "and orders this case briefed and argued in the normal course" as they urge, Supp. Br. 7 n.4, this case would not be briefed and argued until late 2017 or early 2018, and it is quite possible a decision may not issue until the end of June of 2018. At that point, Appellants would no doubt once again claim it would be "exceedingly difficult" and impose "massive costs" on them to put a remedy in place in time for the 2018 elections, just as they did in successfully opposing a remedy in time for the 2016 elections. Appellants hope to simply run out the clock and win by default.

Thus, while Appellants encourage this Court to note probable jurisdiction so as to "provide substantial guidance on recurring issues," Supp. Br. 7 n.4, that is not the job of this Court. This Court has a case before it in which special elections have been ordered for November 2017 and that case will most certainly become moot if the Court does not act to dispose of the case by the end of this Term. For the reasons explained in Appellees' motion to affirm, this Court should summarily affirm the remedial order below. If it does not summarily affirm, this Court should remand and direct the court below to quickly determine the feasibility of holding elections in November 2017, and if that is no longer possible, to implement a swift remedy to cure the "severe constitutional harms," including "substantial stigmatic and representational injuries," not just for Appellees, but for "thousands of other North Carolina citizens." No. 16-1023 App. 142, 144.

CONCLUSION

The Court should summarily affirm the three-judge court's decisions in both of these appeals. As to appeal No. 16-1023, if the Court does not summarily affirm, it should remand with instructions to the Court below to quickly determine the feasibility of holding a special election in November 2017 and, if a November 2017 election is no longer feasible, to implement a swift remedy for the constitutional harms to North Carolina's voters.

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